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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

IN RE THE INTEREST OF H.S.H.-K.

ELSBETH KNOTT,

Petitioner,

- VS -

SANDRA LYNN HOLTZMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Charles Schutze*
Schutze Law Office
306 East Wilson St.
Second Floor
Madison, WI 53703

September 8, 1995
* Counsel of Record

213PP

QUESTIONS PRESENTED

I. Does the Wisconsin Supreme Court's criteria for third party visitation and triggering event violate petitioner's right to due process?

II. Does the Wisconsin Supreme Court's criteria for third party visitation and triggering event deny petitioner the equal protection of the law?

III. Does the state have a right to interfere with a fit parent's decision to deny visitation to an unrelated third party in the absence of a finding that the parent's decision is jeopardizing the health or safety of the child?

IV. Is the criteria established by the Wisconsin Supreme Court so vague as to

render it inoperable?

V. Is the criteria established by the Wisconsin Supreme Court so overbroad as to reach relationships traditionally protected by the Constitution and the U.S. Supreme Court?

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PETITION FOR A WRIT OF CERTIORARI

Elsbeth Knott petitions for a writ of certiorari to review a decision of the Wisconsin Supreme Court entered on June 13, 1995.

OPINIONS BELOW

The decision of the Wisconsin Supreme Court is reported as **In Re the Custody of H.S.H.-K.**, ____Wis.2d ____, 533 N.W.2d 419 (Wis. 1995) and is reproduced in the Appendix (hereinafter "App.") to this petition. App. Pp. 1a-141a.

This matter was accepted by the Wisconsin Supreme Court on Petition to Bypass the Court of Appeals submitted by

the Guardian Ad Litem.

The original Decision and Order of the trial court is not reported but is reproduced in the Appendix pp.142a-175a.

JURISDICTION

The Wisconsin Supreme Court entered its decision on June 13, 1995 making this petition due to be filed by or on September 11, 1995. No petition for rehearing was filed in the Wisconsin Supreme Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) and Supreme Court Rules 10.1(c), and 13.1.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

The Ninth and Fourteenth Amendments to the United States Constitution are reproduced in the Appendix. App. p. 176a.

There are no state statutes involved. The Wisconsin Supreme Court used its "equitable powers" to create a new set of rules for third party visitation. The rules provide in pertinent part:

"...we conclude that a circuit court may determine whether visitation is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. To meet these two requirements, the petitioner must prove the component elements of each one.

To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including

contributing towards the child's support, without expectation of financial compensation;[1] *[FN2] and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.*[2] *[FN3].*

To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference." App. pp. 10a-12a.

An existing statute, §767.245(1) Wis. Stat. applies only when there is an underlying family law action evidencing the dissolution of an intact family such

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[1] [FN2] A petitioner's contribution to a child's support need not be monetary.

[2] [FN3]We do not by this opinion mean to interpret what conditions satisfy the statutory requirement of "a relationship similar to a parent-child relationship with the child" in sec. 767.245(1)

as a divorce:

Section 767.245(1). Upon petition by a grandparent, great-grandparent, stepparent or person who has maintained a relationship similar to a parent- child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

STATEMENT OF THE CASE

Nature of the Case. This case involves several issues related to third party visitation over the objection of a fit biological parent. The issues of due process, equal protection and the right to privacy were raised in petitioner's brief to the Wisconsin Supreme Court. The Wisconsin Supreme Court's opinion stated:

"Finally, mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child, we conclude

that a circuit court may determine whether visitation is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent." App. p. 10a.

"Knott argues that, as the biological parent, she has a constitutional right to determine who shall visit her child and that this right supersedes rights asserted by her child[3] *or Holtzman.*[4] *The law does not support*

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[3]Holtzman argues that the child, a nonmarital child because Knott and Holtzman cannot marry, is denied equal protection of the law. Holtzman and the guardian ad litem also assert (1) that the child has a liberty interest in continuing his relationship with both parties and in avoiding the harm from separation from one of them and (2) that the circuit court's decision interferes with this liberty interest, depriving the child of substantive due process. For a discussion of the constitutional argument from the child's vantage point, see *In Interest of Angel Lace M.*, 184 Wis.2d 492, 537 n. 13, 516 N.W.2d 678 (1994) (Heffernan, C.J. dissenting).

[4]Holtzman claims that, "as a member of a unitary family" although not biologically

Knott's claim that biological or adoptive parents have absolute rights in their children.[5] App. pp. 68a-71a.

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related to the child, she has a constitutionally protected right to seek custody of or visitation with the child. The United States Supreme Court, she explains, has favored an established family-type relationship over a biological bond in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989), and *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614(1983).

[5]This court has allowed a nonparent to have visitation rights with a child over the objections of the custodial parent in a case arising more than 30 years after the United States Supreme Court announced that parents have a protected liberty interest in rearing their children. In *Gotz v. Gotz*, 274 Wis. 472, 80 N.W.2d 359 (1957), the court upheld the trial court's order granting visitation to two maternal aunts, against the wishes of the biological father who had custody of the child. There is little uniformity in the case law concerning nonparental visitation over the objection of a biological or adoptive parent, but some courts have observed a judicial trend toward considering or allowing visitation to nonparents who have a parent-like relationship with the child if visitation would be in the best interest of the child. See, e.g., *In the Matter of Adoption of Francisco A.*, 116 N.M. 708, 866 P.2d 1175, 1179 (Ct.App.1993) (granting

"This exercise of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only

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visitation to foster parents in adoptive situation); *In re Robin N.*, 7 Cal.App.4th 1140, 1146 (Ct.App.1992) (granting visitation to nonparent who had a parent-like relationship with the child against wishes of parents); *In re Hirenia C.*, 18 Cal.App.4th 504, 519, 22 Cal.Rptr.2d 443 (Ct.App.1993) (granting visitation to nonparent who had parent-child relationship with adopted child); Annot., Visitation Rights of Persons Other Than Natural Parents or Grandparents, 1 A.L.R.4th 1270 (1980). But see *In re Marriage of Freel*, 448 N.W.2d 26 (Iowa 1989) (concluding that absent a statute a custodial parent holds a veto power over the visitation rights of anyone except a parent); *In the Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656-57, 569 N.Y.S.2d 586, 572 N.E.2d 27 (Ct.App.1991) (determining that to allow the mother's former partner visitation with the child would impermissibly impair the mother's right to custody and control of her child); *Cooper v. Merkel*, 470 N.W.2d 253 (S.D.1991) (concluding that a nonparent may be granted visitation rights over the objection of a biological parent only with a clear showing of parental gross misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child).

with the consent and assistance of the biological or adoptive parent. App. p. 77a.

Due Process issue: In creating criteria for third party visitation, the Wisconsin Supreme Court totally ignores the biological parent's rights and fitness as a parent. It established a triggering event that allows the parent no option, if she denies visitation, she grants the third party standing.

Equal Protection issue: Petitioner's child was conceived through artificial insemination from an unknown donor. Petitioner and her child represent a unitary family as defined by this Court in **Michael H. v. Gerald D.**, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). In that case, this Court would not allow a biological parent to

interfere with a intact unitary family. In this case, the Wisconsin Supreme Court has granted an unrelated biological stranger the right to interfere with an intact family unit because she is not married.

Interference by State issue: The Wisconsin Supreme Court's justification for interference is the "best interest of the child" and a triggering event that insures that a third party will have standing to interfere. In **Stanley v. Illinois**, 405 U.S. 645, 657, 92 S.Ct 1208, 1216, 31 L.Ed.2d 551(1972) this Court stated at 657 that the state's interest in the child of a fit parent is "de minimis".

Further this Court declared that the state should not interfere with a fit

parent's raising of her child if the parent's method does not "jeopardize the health or safety of the child, or have a potential for significant social burdens". **Wisconsin v. Yoder,** 406 U.S. 205, 234, 92 S.Ct. 1526, 1542, 32 L.Ed. 15 (1972).

Vagueness issue: The Supreme Court criticized the previous law for its failure to define the term "family". Yet the court does not define "non-traditional" . Additionally, in footnote three of the opinion, the Court refuses to apply the same criteria to a relationship similar to a "parent-child" relationship in sec. 767.245(1) Wis. Stat.

Overbreadth issue: Although the Wisconsin Supreme Court's intent is to protect children of "non-traditional" relationships, its criteria for third party standing is so broad that it reaches into families already protected by this Court in **Michael H.** . Traditional married couples with a child, living with relative or friends would be affected by this ruling. Adoptive parents forced to give up the child to the biological parents, would have rights of visitation. A single parent with an adopted child would likewise be affected. The criteria focuses solely on the third party's rights to determine standing and totally ignores the parent's fitness when determining the "best interest" of the child.

Procedural History: Holtzman filed a petition for custody on September 16, 1993, and a petition for visitation on September 21, 1993. On September 29, 1993, Knott filed a motion for summary judgment.

The Dane county circuit court, Judge George Northrup presiding, granted the summary judgment finding that under current law, petitioner did not have standing to petition for visitation. Holtzman appealed.

The circuit court denied Holtzman's and the guardian ad litem's requests for relief pending appeal, specifically the right to exercise visitation. On December 23, 1993, the court of appeals granted Holtzman's request for visitation while the appeal was pending and directed

the circuit court to establish a visitation schedule. On December 24, 1993, Knott filed a petition for a writ of prohibition with the Wisconsin Supreme Court to prevent the circuit court from ordering temporary visitation. On January 6, 1994, that court directed the circuit court to hold the planned hearing to determine a visitation schedule but to stay the implementation of the visitation schedule until the court had considered Knott's petition. On February 3, 1994, the Wisconsin Supreme Court denied the petition for a writ of prohibition and lifted the previously imposed stay on visitation.

The Guardian Ad Litem petitioned the Wisconsin Supreme Court to Bypass the Court of Appeals. The petition was granted.

The Wisconsin Supreme Court upheld the trial court's summary judgment on the custody issue finding that the petitioner had not raised a triable issue of fitness. App. 9a.

The Wisconsin Supreme Court created a new set of criteria to determine whether a third party may have standing to petition for visitation.

Lower Court's Jurisdiction: Holtzman petitioned for custody and visitation under sec. 767.245(1) Wis.Stat. The trial court granted summary judgment dismissing the petitioner due to lack of standing under the current state of the law.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ACCEPT JURISDICTION IN THIS CASE BECAUSE THE DECISION OF THE SUPREME COURT OF THE STATE OF WISCONSIN CONFLICTS WITH SEVERAL DECISIONS ISSUED BY THIS COURT.

The Wisconsin Supreme Court's decision is in conflict with several decision of this Court which established parental rights. The trial court found petitioner to be a fit parent and that there no compelling circumstances warranting a transfer of custody.

"[3][4] The circuit court concluded that Holtzman had not shown a triable issue regarding Knott's fitness or ability to care for the child. Nor had Holtzman established the existence of compelling circumstances that would warrant a hearing on transferring custody from Knott, the biological parent.[6] *We*

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[6]Holtzman sought access to Knott's mental health records to support her claims of Knott's unfitness or compelling

agree with the circuit court's evaluation of the record." App. pp. 21a-23a.

When a parent is found to be fit, the State's interest in caring for that child is "de minimis". **Stanley v. Illinois**, 405 U.S. 645, 657, 92 S.Ct 1208, 1216, 31 L.Ed.2d 551(1972). Also the state has no right to interfere if a parent's child raising method does not

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circumstances, relying on sec. 802.08(4), Stats. 1991-92, which provides as follows: Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. (Emphases added.) Section 802.08(4) grants the circuit court discretion to permit affidavits to be obtained or discovery to be had. On the basis of this record we cannot conclude that the circuit court erroneously exercised its discretion in refusing to give Holtzman access to privileged mental health records.

"jeopardize the health or safety of the child, or have a potential for significant social burdens". **Wisconsin v. Yoder,** 406 U.S. 205, 234, 92 S.Ct. 1526, 1542, 32 L.Ed. 15 (1972). In **Yoder**, the state's interest in the education of children had to give way to a fit parents' right to determine the best interest of their child. Yet, despite being found to be a fit parent, and without any showing that her actions are jeopardizing the health or safety of the child, the state has taken away her right to decide what is in the best interest of her child.

In **Stanley**, the Supreme Court held that, because of the importance of the interest at stake, the State could not interfere with a parent's right to raise

his children without an actual finding of unfitness.

In this case, the State of Wisconsin does not have the right to interfere with the rights of Elsbeth Knott to raise her child as she sees fit because it has determined she is a fit parent and there exists no compelling reason for such interference. The decision by the Wisconsin Supreme Court has deprived Elsbeth Knott of her right to protection of her liberty interest

The Wisconsin Supreme Court's decision denies petitioner many of her other constitutionally protected rights. The relationship between Elsbeth Knott and her biological child is a relationship that has traditionally been afforded the protections guaranteed under the Ninth and the Fourteenth Amendments

to the Constitution. **Griswold v. Connecticut**, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 510 (1965). The right to conceive and raise one's children has been deemed "*essential*". **Meyer v. Nebraska**, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). and referred to as one of the "*basic civil rights of man.*" **Skinner v. Oklahoma**, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). This Court has viewed this right with "*a momentum of respect lacking when appeal is made to liberties which derive merely from shifting economic purposes*". **Kovacs v. Cooper**, 336 U.S. 77, 95, 69 S.Ct. 448, 458, 93 L.Ed. 513 (1949)(Frankfurter, J., concurring).

It is well established that the

protection of this relationship under the Fourteenth Amendment extends not only to the right to conceive and bear children, but also to the right to raise one's children without unwarranted interference by the State. **Wisconsin v. Yoder**, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972). "*It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.*" **Prince v. Massachusetts**, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944).

This Court has made it clear that this relationship extends not only to traditional marital family relationships,

but also to non-traditional families. **Moore v. City of East Cleveland, Ohio**, 431 U.S. 494, 503, 07 S.Ct. 1932, 1938, 52 L.Ed.2d. 531 (1977). "*The family unit accorded traditional respect in our society, which we have referred to as the 'unitary family', is typified, of course, by the marital family, but also includes the household of unmarried parents and their children.*" **Michael H. v. Gerald D.**, 491 U.S. 110, 109 S.Ct. 2333, 2342 (ftnte #3)(1989).

The Wisconsin Supreme Court ruling attempts to protect the child when a non-traditional adult relationship dissolves. In doing so, it focuses first on the third party's qualification to seek visitation. However, nowhere does the Court look to see if it is dealing with

an intact family unit that has traditionally enjoyed the protection from state intervention. Such protection is the basis of the holding in **Michael H. v. Gerald D.**, 491 U.S. 110, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989). In that case, a biological father was not permitted visitation with his child because the child was born into a marital relationship and such visitation would disrupt the marital unit. In this case, the person seeking visitation has no biological ties to the child and therefore has even less of an argument than Michael H. had. In refuting Michael H.'s case law arguments that he had a constitutionally protected right as a biological parent, this Court stated:

> *"We think that distorts the rationale of those cases. As we view*

them, they rest not upon such isolated factors but upon the historical respect-indeed, sanctity would not be too strong a term - traditionally accorded to the relationships that develop within the unitary family." (FN3) **Michael H.** *at 2342.*

(FN3) "...The family unit accorded traditional respect in our society, which we have referred to as the "unitary family" is typified, of course, by the marital family, but also includes the household of unmarried parents and their children. Perhaps the concept can be expended even beyond this, but it will bear no resemblance to traditionally respected relationships-and will thus cease to have any constitutional significance-if it is stretched so far as to include the relationship established between a married woman, her lover and their child, during a three month sojourn in St. Thomas, or during a subsequent 8-month period when, if he happened to be in Los Angeles, he stayed with her and the child." **Michael H.**, *at 2342.*

In **Michael H.**, the U.S. Supreme Court summarily dismissed the child's due process argument as being weaker than the father's. **Michael H.**, at 2346.

Under the Wisconsin ruling, a

mother, father and child who move in with a family member or friend would subject themselves to continued visitation by the third party if they accept any kind of parental-type assistance from the third party. Assistance in babysitting, feeding, homework, transportation or other similar parent-like functions are normally offered by other members of the household, especially family members. In today's society, there are many young couples who need the assistance of others in their first few years as they struggle to establish themselves. Relying on a boyfriend or girlfriend, roommate, or live-in relative is not uncommon. Such a third party would qualify for visitation over the objection of both parents.

The triggering event is merely the interference of the relationship between

the third party and the child. The parent has no choice, either grant visitation or grant standing to sue.

In this case, the child was a product of artificial insemination. There is no legal father. It is similar to a single parent adopting a child and not dissimilar to a widow or widower and child whose other parent is deceased. This type of family unit is part of the unitary family described by the U.S. Supreme Court in **Michael H.**. As such, they are protected from unwarranted state or third party intervention. The relationship of the mother and child deserve the respect accorded the traditional unitary family. The Wisconsin ruling provides no exception for the protected family unit, imposes the

state's determination of best interest over the natural parents' without a finding of unfitness or danger to the child, places the rights of the third party and child over the rights of the natural parent. In doing so, the court has created a law that is so over broad that it ignores the rights and traditional protection accorded the unitary family by this Court.

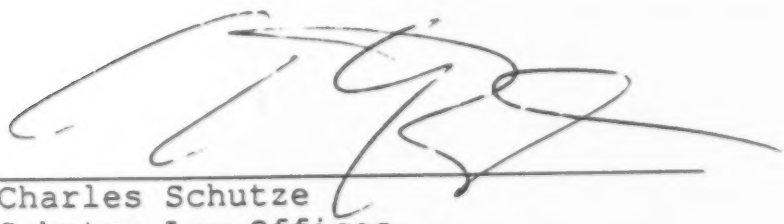
CONCLUSION

This petition for a writ of certiorari should be granted because the Wisconsin Supreme Court's decision denies petitioner her constitutionally protected rights to privacy, due process and equal protection. Its decision clearly conflicts with many of this Court's past

decisions regarding these rights. Moreover, the decision, is so overbroad that it ignores virtually all of the respect, rights and protection accorded the unitary family by this Court.

Dated September 5, 1995

Respectfully submitted,

By 

Charles Schutze
Schutze Law Offices
Attorneys for Elsbeth Knott

306 East Wilson Street
Madison, WI 53703
TEL: (608) 258-9965
FAX: (608)258-9976

APPENDIX

Decision of the Wisconsin Supreme Court in **In Re the Custody of H.S.H.-K.**, ____ Wis.2d ____, 533 N.W.2d 419 (Wis. 1995)..... 1a

Order and Decision..... 142a

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Fourteenth Amendment..... 176a

In re the CUSTODY OF H.S.H.-K.
Sandra Lynne HOLTZMAN,
Petitioner-Appellant,
v.
Elsbeth KNOTT, Respondent-Respondent.
No. 93-2911.
Supreme Court of Wisconsin.
Argued Oct. 12, 1994.
Decided June 13, 1995.

Biological mother's former partner filed petition seeking custody or visitation rights to child. The Circuit Court for Dane County, George A. Northrup, J., dismissed petition. Former partner appealed and guardian ad litem's petition to bypass the Court of Appeals was granted. The Supreme Court, Shirley S. Abrahamson, J., held that: (1) former partner could not bring action to obtain custody; (2) former partner could not petition for visitation under statute contemplating dissolution of marriage, but that statute was not exclusive means of obtaining court-ordered visitation; and (3) circuit court has equitable power to hear petition for visitation when it determines that petitioner has parent-like relationship with child and that a significant triggering event justifies

state intervention in child's relationship with biological or adoptive parent.

Affirmed in part, reversed in part and remanded.

Bablitch, J., filed concurring opinion in which Heffernan, C.J., Shirley S. Abrahamson and Geske, JJ., joined.

Steinmetz, J., filed concurring and dissenting opinion in which Day, J., joined.

Wilcox, J., filed concurring and dissenting opinion.

[1] PARENT AND CHILD k2(7)
285k2(7)
Person who is not biological or adoptive parent may not bring action to obtain custody of minor unless biological or adoptive parent is unfit or unable to care for child or there are compelling reasons for awarding custody to nonparent. W.S.A. 767.24.

[2] INFANTS k156
211k156
Fit and able parent may be denied custody under compelling circumstance, including abandonment, persistent neglect of parental responsibilities, extended

disruption of parental custody, or other similar extraordinary circumstance that would drastically affect welfare of child. W.S.A. 767.24.

[2] INFANTS k157
211k157
Fit and able parent may be denied custody under compelling circumstance, including abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstance that would drastically affect welfare of child. W.S.A. 767.24.

[3] MENTAL HEALTH k21
257Ak21
In action by biological mother's former partner, seeking custody of or visitation rights to child, trial court properly exercised its discretion in refusing to give partner access to mother's mental health records to support her claims of mother's unfitness or compelling circumstances. W.S.A. 802.08(4).

[3] PARENT AND CHILD k2(4.1)
285k2(4.1)

In action by biological mother's former partner, seeking custody of or visitation rights to child, trial court properly exercised its discretion in refusing to give partner access to mother's mental health records to support her claims of mother's unfitness or compelling circumstances. W.S.A. 802.08(4).

[3] PARENT AND CHILD k2(17)
285k2(17)
In action by biological mother's former partner, seeking custody of or visitation rights to child, trial court properly exercised its discretion in refusing to give partner access to mother's mental health records to support her claims of mother's unfitness or compelling circumstances. W.S.A. 802.08(4).

[4] PARENT AND CHILD k2(7)
285k2(7)
Absent showing that biological mother was unfit or unable to care for her child, mother's former partner could not bring action to obtain custody. W.S.A. 767.24.

[5] PARENT AND CHILD k2(17)
285k2(17)

Visitation statute, which was enacted with dissolution of marriage in mind, did not apply to petition by biological mother's former partner for visitation rights to child. W.S.A. 767.245.

[6] INFANTS k19.3(4)
211k19.3(4)
Visitation statute enacted with dissolution of marriage in mind was not exclusive and did not supplant or preempt courts' longstanding equitable power to protect best interest of child by ordering visitation in circumstances not included in the statute. W.S.A. 767.245.

[7] PARENT AND CHILD k2(17)
285k2(17)
Public policy considerations do not prohibit court from relying on its equitable powers to grant visitation apart from statute applying in context of dissolution of marriage, on basis of coparenting agreement between biological parent and another when visitation is in child's best interest; overruling In re Interest of Z.J.H., 471 N.W.2d 202, 162 Wis.2d 1002.
[8] PARENT AND CHILD k15

285k15
Circuit court has equitable power to hear petition for visitation when it determines that petitioner has parent-like relationship with child and that a significant triggering event justifies state intervention in child's relationship with biological or adoptive parent.

[9] PARENT AND CHILD k15
285k15
To demonstrate existence of parent-like relationship with child, as would support assertion by circuit court of equitable power to hear petition for visitation, petitioner must prove that: biological or adoptive parent consented to, and fostered, petitioner's formation and establishment of parent- like relationship with child; petitioner and child lived together in same household; petitioner assumed obligations of parenthood by taking significant responsibility for child's care, education and development, including contributing toward child's support, without expectation of financial compensation; and petitioner has been in parental role for length of time sufficient to have established with the

child a bonded, dependent relationship parental nature.

[10] PARENT AND CHILD k2(19)
285k2(19)
To establish significant triggering event justifying state intervention in child's relationship with biological or adoptive parent, petitioner for visitation must prove that parent has interfered substantially with petitioner's parent-like relationship with child, and that petitioner sought court-ordered visitation within reasonable time after parent's interference.

***420** For the petitioner-appellant there was a brief by Judith Sperling Newton, Carol M. Gapen and Stafford, Rosenbaum, Rieser & Hansen, Madison and oral argument by Judith S. Newton.

For the respondent-respondent there was a brief by Charles Schutze, Kelly Kinzel and Schutze Law Offices, Madison and oral argument by Charles Schutze.

Guardian Ad Litem briefs were filed (in the Court of Appeals) by Linda S. Balisle and Balisle & Roberson, S.C., Madison and oral argument by Linda S. Balisle.

Amicus curiae brief was filed by Shannan Wilber and Youth Law Center, San Francisco, CA, Marvin Ventrell and Nat. Ass'n of Counsel for Children, Denver, CO and Joan Heifetz Hollinger, University of California, for the Youth Law Center and Nat. Ass'n of Counsel for Children.

SHIRLEY S. ABRAHAMSON, Justice.

Sandra Lynne Holtzman appeals from an order of the circuit court for Dane county, George A.W. Northrup, circuit judge, dismissing her petition seeking custody of or visitation rights to H.S., the biological child of Elsbeth Knott. We granted the guardian ad litem's petition to bypass the court of appeals. Section (Rule) 809.60, Stats. 1991-92. We affirm that part of the order dismissing the petition for custody; we reverse that part of the order dismissing the petition for visitation rights and remand the case to the circuit court for proceedings consistent with this opinion.

Two issues of law are presented in this case. The first issue is whether Holtzman's assertions of Knott's parental unfitness and inability to care for the child, or of compelling circumstances

requiring a change of custody, are sufficient to proceed on a petition for custody under sec. 767.24(3), Stats. 1991-92. The second issue is whether Holtzman may seek visitation rights to the child.[1]

We agree with the circuit court that Holtzman has not raised a triable issue regarding Knott's fitness or ability to parent her child and has not shown compelling circumstances requiring a change of custody. Therefore the circuit court properly dismissed the custody action commenced under sec. 767.24(3), Stats. 1991-92.

***421** For the reasons set forth, we conclude that the ch. 767 visitation

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[1] The two questions of law arise in an appeal from an order granting Knott's motion for summary judgment. Summary judgments are governed by sec. 802.08, Stats. 1991-92, and this court reviews the circuit court's order for summary judgment by applying the same methodology as the circuit court. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 315, 401 N.W.2d 816 (1987).

statute, sec. 767.245, Stats. 1991-92, does not apply to Holtzman's petition for visitation rights to Knott's biological child. However, we further conclude that the legislature did not intend that sec. 767.245 be the exclusive means of obtaining court-ordered visitation, or that it supplant or preempt the courts' long recognized equitable power to protect the best interest of a child by ordering visitation under circumstances not included in the statute. Finally, mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child, we conclude that a circuit court may determine whether visitation is in a child's best interest if the petitioner first proves that he or she has a parent-like relationship with the child and that a significant triggering event justifies state intervention in the child's relationship with a biological or adoptive parent. To meet these two requirements, the petitioner must prove the component elements of each one.

To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four

elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation;[2] and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[3]

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[2] A petitioner's contribution to a child's support need not be monetary.

[3]We do not by this opinion mean to interpret what conditions satisfy the statutory requirement of "a relationship similar to a parent-child relationship with the child" in sec. 767.245(1).

To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference.

The petitioner must prove all these elements before a circuit court may consider whether visitation is in the best interest of the child. The proceedings must focus on the child. When a non-traditional adult relationship is dissolving, the child is as likely to become a victim of turmoil and adult hostility as is a child subject to the dissolution of a marriage. Such a child needs and deserves the protection of the courts as much as a child of a dissolving traditional relationship. *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 1033, 471 N.W.2d 202 (1991) (Bablitch, J. dissenting).

We remand the issue of visitation to the circuit court for proceedings consistent with this opinion.

I.

The facts as found by the circuit court are as follows:

Holtzman and Knott are two women who shared a close, committed relationship for more than ten years. Holtzman and Knott met in February 1983. In October 1983, they began to live together in a home they jointly purchased in Boston, Massachusetts. On September 15, 1984, they solemnized their commitment to each other, exchanging vows and rings in a private ceremony.

They decided early in their relationship to rear a child together by having Knott artificially inseminated with sperm from an anonymous donor. After a miscarriage and illness, Knott became pregnant in March 1988. Holtzman and Knott attended obstetrical visits and childbirth classes together.

The child was born on December 15, 1988. Holtzman was present during labor and delivery and took three weeks off from work to stay with Knott and the child. Holtzman and Knott jointly selected a name for the baby, ***422** using first and middle names from each of their families and a surname which combined their last names.

Both women were named as the child's parents at the child's dedication ceremony at their church. Holtzman's parents were recognized as the child's grandparents and Holtzman's sister was formally named as his godmother.

From December 1988 until January 1, 1993, Holtzman provided the primary financial support for Knott, herself and the child and both women shared child-care responsibilities. Together, the three attended church, went on outings and celebrated holidays. Holtzman devoted herself to the child and spent individual time with him.

The two women explained to the child that there are many kinds of families and that he had two parents who loved him very much. The child called Holtzman "My San," and each year on Father's Day Holtzman, Knott and the child celebrated their own special holiday honoring Holtzman.

Holtzman, Knott and the child moved to Madison, Wisconsin, in June 1992 so that Holtzman could attend law school. They sold their home in Boston and bought a home in Madison, not far from Holtzman's family. The child became attached to Holtzman's parents as his grandparents and

to Holtzman's sister as his aunt and godmother.

During the fall of 1992, Holtzman claims to have noticed a change in Knott's behavior. She asserts that Knott suffered from depression and her care for the child deteriorated.

On January 1, 1993, Knott told Holtzman that their relationship was over. The two women agreed that they would continue to live together in the home for the child's sake. On May 26, 1993, Knott and the child moved out of the house. Holtzman made every effort to maintain contact with the child and spent as much time with him as Knott would allow. On August 24, 1994, Knott informed Holtzman that she was terminating Holtzman's relationship with the child.

Two days later, on August 26, 1993, Knott sought an order in Dane county circuit court to restrain Holtzman from having any contact with her or the child, claiming Holtzman had threatened or intimidated her. At the hearing on the petition, held on September 1, 1993, before Dane County Circuit Judge Richard J. Callaway, the two women entered into a stipulation on the record. Knott agreed to

dismiss the petition; Holtzman agreed not to contact Knott. Both women agreed to participate in a physical placement study to be conducted by the Dane County Family Court Counseling Service, and to have a guardian ad litem appointed for the child.

Holtzman filed a petition for custody on September 16, 1993, and a petition for visitation on September 21, 1993. On September 29, 1993, Knott filed a motion for summary judgment.

After interviewing the child, the guardian ad litem reported the following facts to the circuit court: The child stated that he believed Holtzman was his parent and that he would like to see, spend time with and telephone Holtzman. He was able to recite Holtzman's new address and telephone number. The child acknowledged that his mother no longer viewed Holtzman as his parent, that she would be upset if he continued to see Holtzman, but that he wanted to see her anyway. He stated that he did not consider anyone other than Holtzman and Knott to be his parents.

The circuit court reluctantly granted Knott's motion for summary judgment. It concluded that the current visitation law,

while seeking to protect the best interest of children in traditional families torn asunder, ignores the welfare of children reared by adults in nontraditional relationships when those relationships terminate. According to the circuit court, the visitation law does not recognize the parent-like bond that forms between a child and a parent's nontraditional partner and the subsequent trauma to the child when the adult relationship dissolves. Urging this court and the legislature to reexamine the law in light of the realities of modern society and the best interest of the children, the circuit court wrote as follows: The court sees this as a case where a family member ought to have the right to visit and keep an eye on the welfare of a minor child with whom she has developed a parent-like relationship. Unfortunately ***423** because the law does not recognize the alternative type of relationship which existed in this case, this court can not offer the relief Holtzman seeks. Decision and order at 8.

The circuit court continued this thought as follows: There are an increasing number of children in this

society for whom the mother is the only known biological parent. Frequently that mother forms a lengthy relationship living with another person, be they man or woman, who assumes a parental role in the child's life for many years. Why should such children be denied the love, guidance and nurturing of the parental bond which developed simply because the adults cannot maintain their relationship? Lack of love and guidance in the lives of children is a major problem in our society. Does it make sense for the law to worsen this sad fact by denying a child contact with one they have come to accept as their parent, especially when it clearly appears to be in the best interest of the child? Decision and order at 17.[4]

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[4]The circuit court denied Holtzman's and the guardian ad litem's requests for relief pending appeal, specifically the right to exercise visitation. On December 23, 1993, the court of appeals granted Holtzman's request for visitation while the appeal was pending and directed the circuit court to establish a visitation schedule. On December 24, 1993, Knott

Holtzman appealed from the order. This court granted the guardian ad litem's petition to bypass the court of appeals.

II.

Holtzman asserts that her action for custody is governed by sec. 767.24, Stats. 1991-92, which provides as follows: (1) General provisions. In rendering a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.02(1)(e) [custody], the court shall make such provisions as it deems just and reasonable concerning the legal custody and physical placement of

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filed a petition for a writ of prohibition with this court to prevent the circuit court from ordering temporary visitation. On January 6, 1994, this court directed the circuit court to hold the planned hearing to determine a visitation schedule but to stay the implementation of the visitation schedule until this court had considered Knott's petition. On February 3, 1994, this court denied the petition for a writ of prohibition and lifted the previously imposed stay on visitation.

any minor child of the parties, as provided in this section.

. . . . .

(3) Custody to agency or relative. (a) If the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child, the court may declare the child to be in need of protection or services and transfer legal custody of the child to a relative of the child, as defined in s. 48.02(10), to a county department, as defined under s. 48.02(2g), or to a licensed child welfare agency....

[1] Holtzman claims that she has "standing" to bring an action under sec. 767.24, Stats. 1991-92, to obtain custody of the child. The concept of "standing" is used in custody actions to mean that the petitioner "has status to bring an action for custody under the applicable statute." *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 1008 n. 3, 471 N.W.2d 202 (1991). A person who is not a biological or adoptive parent may not bring an action to obtain custody of a minor unless the biological or adoptive parent is "unfit or

unable to care for the child" or there are compelling reasons for awarding custody to a nonparent. *Z.J.H.*, 162 Wis.2d at 1009, 471 N.W.2d 202; *Barstad v. Frazier*, 118 Wis.2d 549, 568, 348 N.W.2d 479 (1984).

[2] The court has equated the showing required to prove that a parent is "unfit or unable to care for the child" with the showing required of persons petitioning for the termination of parental rights. *Barstad*, 118 Wis.2d at 556, 348 N.W.2d 479. See also *Z.J.H.*, 162 Wis.2d at 1010, 471 N.W.2d 202 (suggesting that in a custody action the parent's fitness is evaluated according to the standards used for a child in need of protection or services (CHIPS) proceeding). A fit and able parent may, however, be denied ***424** custody under compelling circumstances. *Barstad*, 118 Wis.2d at 564, 348 N.W.2d 479. Compelling circumstances include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or "other similar extraordinary circumstances that would drastically affect the welfare of the child." *Barstad*, 118 Wis.2d at 568, 348 N.W.2d 479.

[3][4] The circuit court concluded

that Holtzman had not shown a triable issue regarding Knott's fitness or ability to care for the child. Nor had Holtzman established the existence of compelling circumstances that would warrant a hearing on transferring custody from Knott, the biological parent.[5] We agree with the

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[5]Holtzman sought access to Knott's mental health records to support her claims of Knott's unfitness or compelling circumstances, relying on sec. 802.08(4), Stats. 1991-92, which provides as follows: Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. (Emphases added.) Section 802.08(4) grants the circuit court discretion to permit affidavits to be obtained or discovery to be had. On the basis of this record we cannot conclude that the circuit court erroneously exercised its discretion in

circuit court's evaluation of the record. Summary judgment is properly entered when the pleadings and depositions, together with affidavits, do not establish a genuine issue of material fact. No triable issue of fact regarding Knott's fitness or ability to care for the child has been presented. Nor do the facts alleged rise to the level of compelling circumstances. Thus we conclude as a matter of law that the facts presented fail to meet the standards set forth in sec. 767.24. Accordingly we affirm this part of the circuit court's order.

III.

The circuit court's conclusion that Holtzman has no "standing" to bring a custody action became the basis for its dismissal of Holtzman's petition for visitation. Citing *Z.J.H.*, 162 Wis.2d at 1020, 471 N.W.2d 202, the circuit court concluded that before it could consider whether granting Holtzman visitation under sec. 767.245(1), Stats. 1991-92, was in

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refusing to give Holtzman access to privileged mental health records.

the child's best interest "there must be an underlying action affecting the family." Because the custody action was dismissed, the circuit court concluded that there was no underlying action affecting the family in this case.

It is important to note that the ch. 767 visitation statute, sec. 767.245(1), Stats. 1991-92, does not explicitly require an underlying action affecting the family before a circuit court may determine whether a petitioner's relationship with a child falls within the statute and whether visitation is in the child's best interest. The ch. 767 visitation statute reads as follows: Section 767.245(1). Upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent- child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

Holtzman argues that she may petition for visitation under this statute because she has maintained a relationship similar

to a parent-child relationship with Knott's biological child and because her estrangement from Knott was a de facto divorce, that is, "an action affecting the family."

[5] Our analysis of the ch. 767 visitation statute and the cases interpreting it compels us to conclude that Holtzman is in error. Section 767.245, Stats. 1991-92, does not apply to the facts of this case. The legislature enacted the ch. 767 visitation statute with the dissolution of marriage in mind. This case does not involve a marriage or its dissolution. This conclusion, however, does not end our inquiry. Our analysis of the ch. 767 visitation statute and the cases also demonstrates, as we explain below, that the legislature did not intend sec. 767.245 to be the exclusive provision on visitation. Nor did the legislature ***425** intend the ch. 767 visitation statute to supplant or preempt the courts' long standing equitable power to protect the best interest of a child by ordering visitation in circumstances not included in the statute. In other words, the legislature did not intend sec. 767.245 to "occupy the field" of visitation.

We begin our examination of whether a circuit court should consider Holtzman's petition for visitation with an analysis of the ch. 767 visitation statute.

A.

To understand the current ch. 767 visitation statute we must look at its history, which reveals the often conflicting policies underlying visitation law. Visitation law balances a biological or adoptive parent's constitutionally protected liberty interest in determining how to rear a child[6] against the best

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[6]*Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), reh'g denied, 321 U.S. 804, 64 S.Ct. 784, 88 L.Ed. 1090 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). This court has said that "[u]nder ordinary circumstances, a natural parent has a protected right under both state law and the United States Constitution to rear his or her children free from

interest of the child. The state not only must respect a biological or adoptive parent's constitutional right, but also must recognize when state intervention in a parent-child relationship is necessary to protect a child's best interest. Visitation law is thus concerned with identifying the triggering events that may justify state intervention.

Prior to 1975, the courts determined without statutory authorization the visitation rights of non-custodial parents and others. In 1975, the legislature enacted two separate visitation statutes relating to grandparent visitation.[7] Both

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governmental intervention." *Barstad*, 118 Wis.2d at 567, 348 N.W.2d 479 (cited with approval in *Z.J.H.*, 162 Wis.2d at 1015, 471 N.W.2d 202, and *Cox v. Williams*, 177 Wis.2d 433, 440, 502 N.W.2d 128 (1993)). See Developments in the Law, The Constitution and the Family, 93 Harv.L.Rev. 1156, 1351-1357 (1980).

[7]Outside these two statutes, courts continued to determine, without statutory

of the 1975 grandparent visitation statutes assured grandparents' rights to visitation on the occurrence of specific triggering events. One statute, sec. 880.155, Stats.1975 (in ch. 880 entitled Guardians and Wards), provided grandparents with visitation rights following the death of a child's parent. This statute is still in existence. Section 880.155, Stats. 1993-94. The other statute, contained in chapter 247 entitled "Actions Affecting Marriage," was the precursor to the current ch. 767 visitation statute and expressly governed grandparent visitation when a court rendered "a judgment of annulment, divorce or legal separation."[8] This statute, sec.

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direction, the visitation rights of other persons, including non- custodial parents. It appears that only one other statute mentioned visitation in 1975--the Uniform Child Custody Jurisdiction Act defining custody to include visitation for purposes of that act. Section 822.02(2), Stats. 1975.

[8] Ch. 122, Laws of 1975.

247.24(1)(c), Stats.1975, provided as follows:

Section 247.24 Judgment; care and custody of minor children. (1) In rendering a judgment of annulment, divorce or legal separation, the court may: .... (c) Grant reasonable visitation privileges to a grandparent of any minor child if the court determines that it is in the best interest and welfare of the child and issue any necessary crder to enforce the same. (Emphasis added.)

In 1977, the legislature substantially revised sec. 247.24 by enacting the Divorce Reform Act (ch. 105, Laws of 1977). Under the 1977 statute, grandparent visitation was no longer expressly limited to circumstances in which a circuit court had rendered a judgment of annulment, divorce or legal separation.[9] The 1977 ch. 247 grandparent visitation provision read as follows:

***426** Section 247.245 Visitation. (4) The court may grant reasonable visitation

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[9]The visitation statute nevertheless remained in chapter 247, entitled "Actions Affecting Marriage."

privileges to a grandparent or greatgrandparent of any minor child upon the grandparent's or greatgrandparent's petition to the court with notice to the parties if the court determines that it is in the best interests and welfare of the child and issue any necessary order to enforce the same.

Although the 1977 ch. 247 visitation statute did not explicitly limit visitation to circumstances in which a circuit court rendered a judgment of annulment, divorce or legal separation, the legislative purpose section of the 1977 Divorce Reform Act discloses that the entire law was directed to actions affecting marriage.[10] In addition, the

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[10]"It is the intent of the legislature to emphasize the present and future needs of the parties to actions affecting marriage and of their children, if any...." Sec. (1), ch. 105, Laws of 1977. The 1977 bill created ch. 247 entitled "Actions Affecting Marriage." Section 247.02(1), Stats. 1979, declared that "actions affecting marriage" are: (a) To affirm marriage.

entire structure of the new statute reveals the legislature's intent to limit its application. Unlike the 1975 ch. 247 visitation statute, the 1977 version focused primarily on the visitation privileges of a noncustodial parent upon the dissolution of a marriage. It seems reasonable to conclude that the legislature intended the grandparent visitation section to apply only under the same circumstances, thus retaining the limits on judicial intervention in a parent-child relationship that had accompanied the earlier ch. 247 visitation statute. These limits restrained a court from granting visitation to a grandparent unless the marriage of the child's parents

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(b) Annulment. (c) Divorce. (d) Legal separation.... (e) Custody. (f) For child support. (g) For maintenance payments. (h) For property division. (i) To modify a judgment in an action affecting marriage granted in this state or elsewhere. (j) For periodic family support payments."

was dissolving.[11]

In 1988, the legislature amended the 1977 ch. 247 [12] grandparent visitation statute by enacting a detailed law relating to custody of children upon

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[11]The Wisconsin Legislative Council, which was instrumental in formulating the 1977 Divorce Reform Act, characterized the 1977 statute as "retain[ing] the statute allowing the court to award visitation rights to a grandparent where that is in the child's best interests, and expands it to include great-grandparents as well." The Divorce Reform Act (Chapter 105, Laws of 1977), Wis.Leg. Council Staff Information Memo 78-9 at 8 (April 18, 1978; revised June 22, 1978) (emphases added). See also analyses of 1983 Wis. Act 450 discussing sec. 767.245 and viewing court-ordered visitation as limited to actions affecting the family. Bill drafting files, microfiche, Wis.State Law Library.

[12] Chapter 247 was renumbered ch. 767. Sec. 50, ch. 32, Laws of 1979.

dissolution of marriage.[13] The major change in 1988, as explained by the Legislative Council's Special Committee notes, was to "extend the current law permitting the court, upon petition, to grant visitation rights to a grandparent or greatgrandparent to: (1) a stepparent; and (2) any person who has maintained a relationship similar to a parent-child relationship with the child."[14] These additions shaped the visitation statute into its present form.

Like the 1977 grandparent visitation statute upon which it is based, the 1988 ch. 767 visitation provision does not expressly limit a petition for visitation to actions affecting the marriage or actions affecting the family. Once again, however, the legislature appears to have intended that visitation petitions brought under sec. 767.245 be considered within the context of a dissolving marriage. The

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[13]1987 Wis. Act 355.

[14]Comments--1987 Act 355, sec. 767.245, West's Wis.Stats.Ann. (1993).

1988 amendment was formulated by the Legislative Council Special Study Committee on Custody Arrangements. The charge to the committee,[15] the minutes of the committee's meetings, the committee's comment on the Act,[16] and the Wisconsin Legislative *427 Council Staff Information Memorandum on the 1988 amendment[17] all

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[15]The Legislative Council's Special Committee on Custody Arrangements was created to study existing laws relating to custody determinations in divorce or related actions. Minutes of Aug. 15, 1984.

[16]The Note to the committee's legislative declaration illustrates the emphasis on dissolution of marriage: "the basic concept underlying many of the changes in this bill [is] that it is in the best interest of a child to have a close, continuing relationship with both parents where the parents have divorced or separated." Sec. 1, 1987 Wis. Act 355.

[17]In discussing visitation rights of nonparents, the Information Memorandum states: "Existing law did not recognize

reveal that the committee's primary concern was with custody issues prompted by the divorce or legal separation of a married couple.[18] Nor did the legislature

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the importance to the child of continuing contact with stepparents or other persons with whom the child has lived in a parent -child type relationship. The Special Committee found that there are currently many cases in which a nonparent who has had a close, meaningful relationship with a child during the parents' marriage is denied an opportunity to even petition for visitation rights with that child after the parents are divorced or separated." Wis.Leg.Council Staff Information Memo 88-5 at 8 (May 3, 1988) (emphasis added).

[18]The legislative findings pronounced at the beginning of 1987 Wisconsin Act 355 state that "the current laws and practices relating to child custody determinations in divorce and other actions affecting the family ... [f]ail to recognize the importance to the child of continuing contact with ... persons with whom the child has lived in a

use the 1988 amendment to alter a court of appeals decision, *Van Cleve v. Hemminger*, 141 Wis.2d 543, 415 N.W.2d 571 (Ct.App.1987), which interpreted the 1977 statute as requiring an action affecting the family.

In 1991, the legislature added a third visitation statute, this time to ch. 48, the Children's Code, allowing certain relatives who have maintained a relationship with a child similar to a parent-child relationship to seek visitation on adoption of a child by a stepparent or relative.[19] Had the

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relationship similar to a parent-child relationship." (Emphasis added.)

[19] 1991 Wis. Act 191. Section 48.925, Stats. 1991-92, provides as follows: "[U]pon petition by a relative who has maintained a relationship similar to a parent-child relationship with a child who has been adopted by a stepparent or relative, the court may grant reasonable visitation rights to that person if [certain requirements are met]." This statute was

legislature intended the ch. 767 visitation statute to apply to circumstances other than the dissolution of a marriage, it could have amended sec. 767.245. Instead it created this new statute. The legislature apparently intended sec. 767.245 to apply to limited circumstances and the new statutory provision to govern other limited circumstances justifying state intervention. The legislature did not intend any or all of the three visitation statutes to preempt the entire field of visitation.

The legislature's intent that sec. 767.245 be triggered by marriage and its dissolution is also evident in the statutory requirement that a petition for ch. 767 visitation, like a petition for divorce, separation and annulment, shall be entitled "In re the Marriage of A.B. and C.D." Section 767.05(5), Stats. 1991-92.

This recitation of the history of the

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designed to overrule that part of *In re Marriage of Soergel*, 154 Wis.2d 564, 453 N.W.2d 624 (1990), which related to adoption.

three visitation statutes illustrates the continuing legislative concern with identifying the triggering events that warrant state interference in an otherwise protected parent-child relationship. As we have seen, the triggering event most often manifest in the history of the ch. 767 visitation statute (and the case law interpreting it) has been the dissolution of a marriage, that is, an annulment, divorce or separation.[20]

After 1977, without the explicit restrictions in the 1975 visitation statute that visitation be granted by a judgment of annulment, divorce or legal separation, courts were left to resolve under what circumstances the visitation statute allowed them to intervene in a parent-child relationship to determine

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[20]The ch. 767 visitation statute also applies to paternity suits. Section 767.51 (6) instructs that a court may order visitation under sec. 767.245 when it enters a paternity judgment or order. No other statute expressly identifies an event triggering the application of the ch. 767 visitation statute.

whether visitation was in the best interest of a child.

Van Cleve v. Hemminger, 141 Wis.2d 543, 415 N.W.2d 571 (Ct.App.1987), considered a grandparent's right to petition for visitation under the ch. 767 visitation statute, sec. 767.245(4), Stats. 1985-86, when the child and both parents lived together. In *Van Cleve*, ***428** the court of appeals construed the visitation statute to apply only to cases where an underlying "action affecting the family" had previously been filed. It concluded that the legislature did not intend the visitation provision "to reach into intact families to override parental determinations involving visitation privileges between their children and the grandparents." 141 Wis.2d at 546-47, 415 N.W.2d 571 (emphasis added).

The Van Cleve court of appeals based its interpretation of the ch. 767 visitation statute on several factors. First, it reviewed the legislative history described above and concluded that the legislature intended to limit the application of the statute. Second, it reasoned that if the ch. 767 visitation statute were interpreted to apply to

visitation under all circumstances, sec. 880.155, governing grandparent visitation at the death of a parent, would be superfluous. Third, the court of appeals determined that public policy encourages state intervention in a parent-child relationship when a family dissolves; under such circumstances the state may mitigate a child's trauma and protect a child's best interest by ordering visitation with appropriate adults. *Van Cleve*, 141 Wis.2d at 549, 415 N.W.2d 571.[21]

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[21]In 1979, the legislature had substituted the phrase "actions affecting the family" for the previously used phrase "actions affecting marriage." Sec. 19, ch. 352, Laws of 1979. At the time Van Cleve was decided, sec. 767.02(1), Stats. 1985-86, defined "actions affecting the family" to include actions "[c]oncerning visitation rights to children." Section 767.02(1)(k), Stats. 1985-86. In Van Cleve, the court of appeals implicitly decided that a grandparent's petition for visitation, although included in the statutory definition of an action affecting the family, did not suffice as an underlying action

This court adhered to the *Van Cleve* decision in three recent cases: *In re Marriage of Soergel*, 154 Wis.2d 564, 453 N.W.2d 624 (1990); *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 1014, 471 N.W.2d 202 (1991); and *Cox v. Williams*, 177 Wis.2d 433, 502 N.W.2d 128 (1993). In each case the court held that the legislature intended the ch. 767 visitation statute to apply only "in divorce or custody cases or in other actions affecting the marriage." *Soergel*, 154 Wis.2d at 573, 453 N.W.2d 624.

In *Soergel*, the parents were divorced, the biological father had terminated his parental rights, and the stepfather had adopted the child. The biological paternal grandparents petitioned for visitation, arguing that their visitation rights to the child should turn solely upon the court's determination of the child's best interest. The court on a 6-0 vote concluded that sec. 767.245(4), Stats. 1985-86, was not intended to interfere

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affecting the family.

with such parental decisions. *Soergel*, 154 Wis.2d at 574, 453 N.W.2d 624.[22]

In *Z.J.H.*, relying on *Van Cleve* and *Soergel*, a divided court (5-2) concluded that there was no authority for an adoptive mother's former female partner to petition for visitation with the child. *Z.J.H.*, 162 Wis.2d at 1014, 471 N.W.2d 202. Without defining family and without further explanation, the majority simply declared (1) that the adoptive mother and child formed an intact family, (2) that the presence of an intact family signals the absence of a dissolving family relationship, and (3) that the legislature did not intend sec. 767.245(1), Stats. 1989-90, to grant third parties visitation with a child in an intact family. The majority did not consider whether the dissolution of the relationship between the mother and her partner might constitute the dissolution of a family.

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[22]This case involved the 1977 ch. 247 visitation statute. The Soergels petitioned for visitation three months prior to the effective date of the 1988 amendments to that statute.

The *Z.J.H.* decision does not make clear whether it rests on the requirement that a family be dissolving (that is, not intact) or on the requirement set forth in *Van Cleve* that an action affecting the family be filed. Indeed the majority acknowledges that its decision rests on either of the following two bases: (1) the mother and the child are an "intact family unit" or (2) there is no "underlying action affecting the family unit." *Z.J.H.*, 162 Wis.2d at 1022, 471 N.W.2d 202.

This confusion was compounded in the most recent supreme court case interpreting the ch. 767 visitation statute, *Cox v. Williams*, 177 Wis.2d 433, 502 N.W.2d 128 (1993). In *Cox*, the issue was whether a ***429** stepmother could seek visitation under sec. 767.245(1) with the child of her deceased husband and his first wife, the child's biological mother. Reversing the court of appeals, a divided court (4-3) concluded that the stepmother had no standing, even though the father had custody of the child from the time of his divorce to the time of his death, and the stepmother had acted as a parent to the child for five years.

Citing *Van Cleve* and *Z.J.H.*, the *Cox* majority required two components in a petition for visitation under sec. 767.245(1): (1) that an "underlying action affecting the family unit has previously been filed" and (2) that the child's family is not intact so that it may be in the child's best interest to order visitation to mitigate the trauma and impact of the dissolving family relationship. *Cox*, 177 Wis.2d at 439, 502 N.W.2d 128.

In addition to determining that there was no underlying action affecting the family, the majority in *Cox* concluded that the child's family was intact. After the father's death, said the court, the child's family consisted only of the child and his biological mother. *Cox*, 177 Wis.2d at 440, 502 N.W.2d 128.

In summary, the cases interpreting the ch. 767 visitation statute have determined that a circuit court may hear a petition for visitation (1) when there is either "an underlying action affecting the family" or "a dissolving family" or (2) when both "an underlying action affecting the family" and "a dissolving family"

exist.[23]

Courts have had difficulty interpreting and applying these broadly stated triggering e nts. First, courts have reached no consensus about which statutorily-defined "actions affecting the family" suffice to meet the court- imposed "actions affecting the family" requirement with respect to petitions for visitation.[24]

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[23]In *Z.J.H.*, the court implied that a CHIPS proceeding would suffice as an action affecting the family. *Z.J.H.*, 162 Wis.2d at 1020, 471 N.W.2d 202. The court cited no authority for this statement.

[24]The three dissenters in Cox, like the court of appeals, concluded that there were three possible underlying actions affecting the family--the divorce action between the child's biological parents, the action by the child's biological mother to modify the divorce judgment, and the biological mother's custody action. The majority in Cox viewed the divorce action as having terminated at the father's death and, without explanation, refused to consider visitation within the

Second, the very concept of "family" is not defined, either in the visitation statute or in the case law.[25] The absence

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custody action. While the ch. 767 visitation statute recognizes stepparents' right to visitation, the majority suggested that only a divorce or separation action between the stepmother and biological father would suffice as a prerequisite to the stepmother's petitioning for visitation under sec. 767.245, Stats. *Cox*, 177 Wis.2d at 441, 502 N.W.2d 128. In the case at bar, Holtzman filed a petition for custody and Knott has sought an injunction. Holtzman views both of these proceedings as underlying actions affecting the family.

[25]We have previously noted that "[t]he legislature has failed to provide any definition for 'family' under ch. 767, or for that matter under any chapter of the Family Code." *Watts v. Watts*, 137 Wis.2d 506, 515-16, 405 N.W.2d 303 (1987) (footnote omitted). The United States Supreme Court has acknowledged "considerable difficulty" in defining "family." The Court noted that "biological

of a definition of family makes the question of whether a family is "dissolving" or "intact" virtually impossible to resolve.

Despite the confusion surrounding the conditions that must exist before a circuit court may consider a petition for visitation under sec. 767.245, the statute and cases reveal a thread consistently woven into the law of visitation: a concern that state intervention in a parent's determination of how to rear a

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relationships are not [the] exclusive determination of the existence of a family" and stated that "the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association and from the role it plays in 'promot[ing] a way of life' through the instruction of children." *Smith v. Organization of Foster Families*, 431 U.S. 816, 842-844, 97 S.Ct. 2094, 2108-2109, 53 L.Ed.2d 14 (1977) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-1542, 32 L.Ed.2d 15 (1972)).

child, a constitutionally protected liberty interest, must be justified by a triggering event. With respect to visitation, this triggering event must be more than a claim that *430 a third party's visitation is in a child's best interest.

As our analysis of the ch. 767 visitation statute and the cases demonstrates, the events triggering application of the statute relate to the dissolution of a marriage. The rationale of the legislature and the courts has been that the end of a marriage adversely affects a child and may result in the separation of the child from a parent, signalling that state intervention in a parent-child relationship may be necessary to protect the child's best interest.

In short, the legislature did not intend the ch. 767 visitation statute to apply in the absence of the dissolution of marriage.[26] The child in this case was

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[26]Chapter 767 ordinarily does not apply unless there is a marriage or the dissolution of a marriage. See Watts v. Watts, 137 Wis.2d 506, 518- 19, 405 N.W.

not born of a marriage or adopted during a marriage, and his biological mother has not been married during his life. We therefore conclude that the legislature did not intend the ch. 767 visitation statute to apply to this case. The circuit court appropriately refused to stretch the statute to fit in the absence of a dissolved marriage. Accordingly, we conclude that Holtzman's reliance on sec. 767.245 is misplaced.

This conclusion does not, however, necessarily eliminate Holtzman's ability to seek visitation with Knott's child unless we also conclude that the legislature intended the courts' power to order visitation in the best interest of a

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2d 303 (1987) (holding that the Family Code, of which ch. 767 is an integral part, "applies, for the most part, to those couples who have been joined in marriage according to law"). Holtzman and Knott were not married and could not marry under the laws of this state. The biological father of Knott's child, an anonymous sperm donor, did not marry Knott and has not developed any relationship with the child.

child to derive exclusively from sec. 767.245.

B.

The history of visitation law, the legislative enactments and the cases demonstrate that the legislature did not intend sec. 767.245 either to be an exclusive grant of power to the courts to determine visitation or to limit the courts' equitable power to protect the best interest of a child by ordering visitation.

First, the history of visitation law in this state shows that the courts governed visitation before it was regulated by statute. Two early and frequently cited Wisconsin cases granting nonparent visitation arose when no statute authorized a court to order visitation: *Weichman v. Weichman*, 50 Wis.2d 731, 184 N.W.2d 882 (1971), and *Ponsford v. Crute*, 56 Wis.2d 407, 202 N.W.2d 5 (1972). The court concluded in these cases that although the divorce statute at issue was silent about visitation, trial courts had the power to grant visitation to nonparents. The *Weichman* court concluded that "there is no statutory or common-law rule which forbids a court in a divorce

action from granting visitation to parents or to others. The question is not one of the power of the court but of judgment or of judicial discretion. The underlying principle ... is what is for the best interest and welfare of the child." *Weichman*, 50 Wis.2d at 734, 184 N.W.2d 882.[27] These early cases were the impetus behind the formulation of the first visitation statute in 1975.[28] Thus the

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[27]As precedent for its decision, the court relied on *Gotz v. Gotz*, 274 Wis. 472, 80 N.W.2d 359 (1957) (allowing visitation by the noncustodial mother's two sisters and their husbands), and *Peterson v. Peterson*, 13 Wis.2d 26, 108 N.W.2d 126 (1961) (declaring that the difficulty and hardship of a parent in exercising visitation rights must be subordinated to the welfare of the child).

[28]According to a Legislative Reference Bureau analysis, the 1975 precursor to the ch. 767 grandparent visitation statute "codifies the authority of the court in actions affecting marriage to grant visitation

courts do not derive their power over visitation from the statutes.

Second, nothing in the 1975, 1977, 1988 or 1991 visitation statutes states or implies that these visitation provisions are designed to displace a court's equitable power to protect the best interest of a child by ordering visitation under circumstances not included in the statutes. Statutory visitation applies under ***431** limited circumstances (adoption of a child, dissolution of marriage, paternity and death of a parent) and to certain persons. Secs. 48.925, 767.245, 767.51(6) and 880.155. At the same time the legislature has clearly and repeatedly expressed the policy that courts are to act in the best interest of children.[29] It

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privileges to grandparents where it is in the best interest of the child." Drafting Record, 1975 S.B. 1311, Wisconsin State Law Library.

[29]Sections 48.925 (visitation on adoption), 767.245 (visitation on dissolution of marriage), and 880.155

is reasonable to infer that the legislature did not intend the visitation statutes to bar the courts from exercising their equitable power to order visitation in circumstances not included within the statutes but in conformity with the policy directions set forth in the statutes.

We reached a similar conclusion about the legislative intent in ch. 767 in *Watts v. Watts*, 137 Wis.2d 506, 405 N.W.2d 303 (1987), which involved property rights, not children. The parties in Watts had never married; they lived together, had children, and held themselves out as husband and wife. When the relationship ended, Sue Ann Watts sued for determination of property rights. The circuit court dismissed her action, concluding that ch. 767, authorizing a

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(visitation on death of parent) direct that the court shall consider and act in the best interest of the child. See also secs. 767.24(5) (best interest of the child in custody and physical placement) and sec. 767.25(2) (best interest of the child in child support).

court to divide property in a dissolution of a marriage, does not apply to property division between unmarried persons. This court reversed, holding that ch. 767 did not preempt the courts' traditional power to settle contract and property disputes between unmarried persons. Similarly we conclude in the case at bar that the legislature did not intend the visitation statutes to preempt the courts' equitable power to protect the best interest of a child by ordering visitation in circumstances not included in the statutes.

The adoption and custody statutes, however, are different from the visitation statutes in regard to preemption. In contrast to visitation cases in which the court has expressly stated that the ch. 767 visitation statute has not supplanted the common law, the court has expressly declared that adoption is governed solely by the adoption statutes. See *Adoption of Tschudy*, 267 Wis. 272, 281, 65 N.W.2d 17 (1954) (stating that "[i]n Wisconsin, adoption proceedings are statutory"); *In re Cheaney's Estate*, 266 Wis. 620, 64 N.W.2d 408 (1954) (concluding that adoption is statutory and that Wisconsin

does not recognize equitable adoption); and Kenneth E. Worthing, Inheritance and Testamentary Rights With Respect to Adopted Children, 1953 Wis.L.Rev. 38, 39 (commenting that rights obtained through and from adoption are purely statutory).

The court has also expressly declared that custody is governed exclusively by the custody statutes, concluding that the legislature has preempted the field.[30] See, e.g., *Hamachek v. Hamachek*, 270 Wis. 194, 198, 70 N.W.2d 595 (1955) (declaring that "[c]ourts have no power in awarding custody of minor children other than that provided by statute"); *Larson v. Larson*, 30 Wis.2d 291, 297, 140 N.W.2d. 230 (1966)

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[30]The statutes, including but not limited to ch. 48 (the Children's Code), secs. 767.02(1)(e) and 767.24, and ch. 880 (Guardians and Wards), Stats. 1991-92, regulate custody proceedings whether in a judgment of annulment, divorce or legal separation, in a judgment in a separate custody action not dependent on marriage or dissolution of marriage, in a ch. 48 proceeding, or in a guardianship proceeding.

(quoting with approval Hamachek's determination that custody is governed solely by statute); *Groh v. Groh*, 110 Wis.2d 117, 123, 327 N.W.2d 655 (1983) (quoting with approval Hamachek's holding that the court's power in custody is governed by statute); *Poeschel v. Poeschel*, 115 Wis.2d 570, 571-72, 341 N.W.2d 407 (Ct.App.1983) (quoting *Groh* and *Hamachek* and concluding that the circuit court's only power in awarding custody of minor children stems from the custody statute); and *Schwantes v. Schwantes*, 121 Wis.2d 607, 622, 360 N.W.2d 69 (Ct.App.1984) (quoting *Groh* and *Hamachek* for the proposition that courts have no power to award custody of minor children other than as provided by statute).

Third, this court has recently reaffirmed the courts' use of their equitable power to order visitation in the best interest of a child in circumstances not described in any visitation statute. In *In re Custody of D.M.M.*, ***432** 137 Wis.2d 375, 404 N.W.2d 530 (1987), a great aunt sought visitation. No statute authorized the award of visitation to a great aunt, yet the court granted her

petition.[31]

In *D.M.M.* the court characterized the visitation statute as ambiguous, stating that it was not clear whether the statute preempted the common law or merely codified "existing law which was not intended to abrogate the visitation rights of others when the best interests of the child warrant...." *D.M.M.*, 137 Wis.2d at 386, 404 N.W.2d 530. Reviewing the history of the visitation statute, the court concluded that the grandparent language "was intended to supplement common law rights of grandparents and others to petition for visitation.... [and

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[31] *In re Custody of D.M.M.*, 137 Wis. 2d 375, 404 N.W.2d 530 (1987), is silent about the need for an underlying action to justify a visitation claim. The underlying action may have been a custody or a guardianship proceeding. *D.M.M.*, 137 Wis.2d at 379, 404 N.W.2d 530. The petition may also have been filed after the divorce of the child's parents because the opinion describes the father as the mother's "husband at the time [of the child's birth]."

was not intended as] a supplantation of the common law." *D.M.M.*, 137 Wis.2d at 388, 404 N.W.2d 530. See also *D.M.M.*, 137 Wis.2d at 390, 404 N.W.2d 530. The *D.M.M.* court declared repeatedly that the 1977 visitation statute as renumbered, sec. 767.245(4), Stats. 1985-86, did not preclude persons other than grandparents and greatgrandparents from petitioning for visitation. This statute merely insured grandparents a statutory right to visitation that was "not subject to developing and changing common law." *D.M.M.*, 137 Wis.2d at 387, 404 N.W.2d 530. Section 767.245 was "a codification of case law to further protect grandparent and greatgrandparents' rights and was not meant thereby to exclude other relatives." *D.M.M.*, 137 Wis.2d at 390, 404 N.W.2d 530.

This court again sanctioned the courts' equitable power to order visitation more recently in *Z.J.H.* Citing *D.M.M.*, the *Z.J.H.* court concluded that "the legislature did not intend to supplant the common law" of visitation when it enacted the ch. 767 visitation statute and did not intend sec. 767.245 to be the exclusive means of petitioning for visitation rights. *Z.J.H.*, 162 Wis.2d at

1014, 471 N.W.2d 202.

This characterization of the power of a circuit court to determine visitation rights apart from the ch. 767 visitation statute comports with this court's precedents recognizing the plenary power of circuit courts and their equitable jurisdiction over children. In *Dovi v. Dovi*, 245 Wis. 50, 55, 13 N.W.2d 585 (1944), the trial court denied the parties a divorce but entered a judgment on the custody of the children. No statute empowered the court to enter such a judgment. The mother challenged the court's authority, arguing that the court has no common law jurisdiction over divorce because divorce law is statutory, and, most importantly, that the legislature had repealed the very statute that had expressly authorized the court to act when it denied a divorce.

The Dovi court acknowledged that if the court had only the jurisdiction conferred upon it by the divorce statutes, the repeal of the section authorizing the court to act when no divorce was granted took away the court's jurisdiction. Nevertheless, after carefully analyzing cases from Wisconsin and other states, the

Dovi court concluded that the question of a court's powers was "not so much one of divorce law" but of "equity jurisdiction." *Dovi*, 245 Wis. at 54, 13 N.W.2d 585.

Courts have jurisdiction in equity apart from the divorce statute to act in the best interest of a child, wrote the Dovi court. The protection of minors is one of the "well established grounds for the exercise of equity jurisdiction." Dovi, 245 Wis. at 57, 13 N.W.2d 585.[32]

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[32]See also *State of Wisconsin ex rel. Lisa Friedrich v. Circuit Court for Dane County*, 192 Wis.2d 1, ----, 531 N.W.2d 32 (1995) (courts have the "duty to protect minors who appear before them"); *Romasko v. Milwaukee*, 108 Wis.2d 32, 37, 38, 321 N.W.2d 123 (1982) ("minors are the special objects of the solicitude of the courts.... [the court has the] governmental function of seeing to it that justice is done to those who are defenseless and who are the objects of the special concern of government"); *Stevenson v. Milwaukee County*, 140 Wis. 14, 17, 121 N.W. 654 (1909) (circuit courts have, by constitution, powers of law and equity and "do not depend

solely upon statute for their powers"); *Harrigan v. Gilchrist*, 121 Wis. 127, 231, 99 N.W. 909 (1904) ("the circuit courts of this state have, under the constitution, succeeded to all the jurisdiction formerly exercised by courts of law and courts of chancery as well"); *Richardson v. Tyson*, 110 Wis. 572, 578, 86 N.W. 250 (1901) ("the infant is always the ward of every court wherein his rights or property are brought in jeopardy, and is entitled to most jealous care that no injustice be done to him"). For other state courts reaching similar conclusions about the courts' equitable powers over children, see, e.g., *Parker v. Parker*, 335 Ill.App. 293, 81 N.E.2d 745, 748 (1948) (courts of equity have plenary jurisdiction over minors); *Metten v. Benge*, 366 N.W.2d 577, 579 (Iowa 1985) (action between unmarried cohabitants about care of child supports exercise of equity jurisdiction); *Wentzel v. Montgomery General Hospital, Inc.*, 293 Md. 685, 447 A.2d 1244, 1253 (1982), cert. denied 459 U.S. 1147, 103 S.Ct. 790, 74 L.Ed.2d 995 (1983) (court of equity may consider petition to sterilize a minor under inherent power);

The repealed statute "merely *433 made applicable to divorce actions a jurisdiction which equity courts already possessed and which might have been exercised without the aid of a statute." *Dovi*, 245 Wis. at 57, 13 N.W.2d 585. Because the statute "did not confer jurisdiction upon the court," its repeal left the courts' equitable jurisdiction over children where it was before the statute was enacted. *Dovi*, 245 Wis. at 55, 13 N.W.2d 585.[33] Similarly in the case

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Stambaugh v. Price, 532 S.W.2d 929, 932 (Tenn.1976) (chancery court has inherent jurisdiction to act in relation to the property and other interests of minors).

[33]See also *In Matter of Guardianship of Eberhardy*, 102 Wis.2d 539, 548-51, 557-60, 307 N.W.2d 881 (1981) in which six justices concluded that although the legislature did not authorize sterilization, circuit courts have the power under the state constitution to entertain a petition for sterilization of an incompetent person; repeal of the sterilization law left the

at bar, the enactment of the visitation statutes did not preempt the court's equitable jurisdiction over visitation in circumstances not included in the statutes.

The United States Supreme Court has explained the courts' equity powers over children as follows: The general authority of courts of equity over the persons and estates of infants ... is not questioned. It may be exerted, upon proper application, for the protection of both. This jurisdiction in the English courts of chancery is supposed to have originated in the prerogative of the crown, arising from its general duty as parens patriae to protect persons who have no other rightful protector.... The jurisdiction possessed by the English courts of chancery from this supposed delegation of the authority of the crown as parens patriae is ... exercised in this country by the courts of the States.... *New York Life Ins. Co. v. Bangs*, 103 U.S. 435, 438, 26 L.Ed. 580 (1880).

In keeping with longstanding

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courts' jurisdiction untouched.

precedent, the D.M.M. and Z.J.H. courts viewed the ch. 767 visitation statute as a legislative declaration of public policy about the rights of certain people to visitation under certain circumstances, but not as a replacement of the equitable jurisdiction of the courts over visitation and the best interest of a child. Accordingly we conclude on the basis of the history of the 767 visitation statute and the case law interpreting this statute that the legislature did not intend sec. 767.245 to supplant or preempt the equitable powers of the court to protect the best interest of a child by ordering visitation under circumstances not included within the visitation statutes. Rather, the legislature intended the courts to use their equitable powers to continue the policy direction of the visitation statutes, that is, to exercise their powers for the best interest of a child when a triggering event justifies state intervention.

[6] There is, however, one determination in *Z.J.H.* that gives us pause. Although the *Z.J.H.* court pronounced that the visitation statutes did not preempt the court's power over

visitation, the court denied standing to an adoptive mother's former partner to petition for visitation on the common law basis of an express co-parenting agreement between the two women. The court, without discussion of its equitable power, concluded that the visitation statute barred any contract concerning visitation. In support of this conclusion the court quoted *Grams v. Melrose-Mindoro Jt. School Dist. No. 1* for the proposition that "[w]hen the legislative will is expressed in peremptory terms of a statute it is paramount and absolute and cannot be varied ***434** or waived by the private conventions of the parties." *Z.J.H.*, 162 Wis.2d at 1024, 471 N.W.2d 202 (quoting *Grams v. Melrose-Mindoro Jt. School Dist. No. 1*, 78 Wis.2d 569, 578, 254 N.W.2d 730 (1977)). On further reflection, we do not find this reasoning persuasive.

The *Grams* case is inapposite. The contract at issue in *Grams* required a teacher to instruct courses that she was not certified to teach when the statutes expressly declared that "[a] teaching contract with any person not legally authorized to teach the named subject ... shall be void." Section 118.21,

Stats.1971. Thus, the contract in *Grams* was explicitly proscribed by the statute. Nothing in ch. 767 expressly prohibits contracts relating to visitation or prohibits a court from granting visitation under circumstances not governed by the statutes.

To bolster its holding that a contract for visitation was a per se violation of the visitation statute, the *Z.J.H.* court also concluded that visitation agreements are unenforceable on public policy grounds. Such agreements, wrote the court, contravene "the public interest in maintaining a stable relationship between a child and his or her legal parent...." *Z.J.H.*, 162 Wis.2d at 1025, 471 N.W.2d 202.

This public policy analysis is not compelling. The *Z.J.H.* court did not consider the 1988 statutory provision allowing a person who has established a parent-like relationship with a child to petition for visitation rights when a marriage dissolves. This statutory provision states a legislative policy that courts should give effect to a biological or adoptive parent's sharing of parental rights and responsibilities with another

adult. Section 767.245(1), Stats. 1991-92.

Furthermore, the *Z.J.H.* court relied on *Stickles v. Reichardt*, 203 Wis. 579, 582, 234 N.W. 728 (1931), for the rule that "in the absence of a statute, contracts of a parent by which a parent attempts to transfer permanently the custody of his child to another are invalid as contrary to public policy." *Z.J.H.*, 162 Wis.2d at 1025, 471 N.W.2d 202. This rule does not apply in the present case. There is no assertion that Knott agreed to transfer permanently the custody of her biological child to Holtzman.[34]

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[34]Moreover, *Stickles* favors, in some circumstances, the enforcement of a parent's agreement relating to the care of the child: Where a parent has voluntarily contracted away his rights and the child as a result has formed new attachments, it may very well be that a situation has been created which a court will hesitate to disturb, not on the principal ground that the contract was valid or invalid, but because, everything considered, the welfare

[7] Upon re-examination of *Z.J.H.*, we conclude that public policy considerations do not prohibit a court from relying on its equitable powers to grant visitation apart from sec. 767.245 on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest. We overrule any language in *Z.J.H.* to the contrary.

IV.

Thus, the issue before the court is whether the circuit court should exercise its equitable powers to consider Holtzman's claim that visitation is in the child's best interest.

Knott argues that, as the biological parent, she has a constitutional right to determine who shall visit her child and that this right supersedes rights asserted

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of the child demands the continuance of the new relationship. *Stickles*, 203 Wis. at 583, 234 N.W. 728.

by her child[35] or Holtzman.[36] The law does

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[35]Holtzman argues that the child, a nonmarital child because Knott and Holtzman cannot marry, is denied equal protection of the law. Holtzman and the guardian ad litem also assert (1) that the child has a liberty interest in continuing his relationship with both parties and in avoiding the harm from separation from one of them and (2) that the circuit court's decision interferes with this liberty interest, depriving the child of substantive due process. For a discussion of the constitutional argument from the child's vantage point, see *In Interest of Angel Lace M.*, 184 Wis.2d 492, 537 n. 13, 516 N.W.2d 678 (1994) (Heffernan, C.J. dissenting).

[36]Holtzman claims that, "as a member of a unitary family" although not biologically related to the child, she has a constitutionally protected right to seek custody of or visitation with the child. The United States Supreme Court, she explains, has favored an established family-type relationship over a biological bond in *Michael H. v. Gerald D.*, 491 U.S. 110, 109 S.Ct.

not support *435 Knott's claim that biological or adoptive parents have absolute rights in their children.[37]

2333, 105 L.Ed.2d 91 (1989), and *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985, 77 L.Ed.2d 614 (1983).

[37]This court has allowed a nonparent to have visitation rights with a child over the objections of the custodial parent in a case arising more than 30 years after the United States Supreme Court announced that parents have a protected liberty interest in rearing their children. In *Gotz v. Gotz*, 274 Wis. 472, 80 N.W.2d 359 (1957), the court upheld the trial court's order granting visitation to two maternal aunts, against the wishes of the biological father who had custody of the child. There is little uniformity in the case law concerning nonparental visitation over the objection of a biological or adoptive parent, but some courts have observed a judicial trend toward considering or allowing visitation to nonparents who have a parent-like relationship with the child if visitation would be in the best interest of

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the child. See, e.g., *In the Matter of Adoption of Francisco A.*, 116 N.M. 708, 866 P.2d 1175, 1179 (Ct.App.1993) (granting visitation to foster parents in adoptive situation); *In re Robin N.*, 7 Cal.App.4th 1140, 1146 (Ct.App.1992) (granting visitation to nonparent who had a parent-like relationship with the child against wishes of parents); *In re Hirenia C.*, 18 Cal.App.4th 504, 519, 22 Cal.Rptr.2d 443 (Ct.App.1993) (granting visitation to nonparent who had parent-child relationship with adopted child); Annot., Visitation Rights of Persons Other Than Natural Parents or Grandparents, 1 A.L.R.4th 1270 (1980). But see *In re Marriage of Freel*, 448 N.W.2d 26 (Iowa 1989) (concluding that absent a statute a custodial parent holds a veto power over the visitation rights of anyone except a parent); *In the Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 656-57, 569 N.Y.S.2d 586, 572 N.E.2d 27 (Ct.App.1991) (determining that to allow the mother's former partner visitation with the child would impermissibly impair the mother's right to custody and control of her child); *Cooper v. Merkel*, 470 N.W.2d 253 (S.D.1991)

The public policy of the state, established by the legislature, directs the court to respect and protect parental autonomy and at the same time to serve the best interest of the child. In the 1988 amendment to the visitation statute, the legislature has also recognized the important role of a nonparent who has a parent-like relationship with a child when the child's life is disrupted by the dissolution of a marriage.

Holtzman and the guardian ad litem contend that the circuit court ought to hear the petition. Hearing Holtzman's petition for visitation would, they argue, be consistent with the policy direction of ch. 767. They assert that Holtzman has established a parent-like relationship with the child and that this relationship comports with the visitation statute.

(concluding that a nonparent may be granted visitation rights over the objection of a biological parent only with a clear showing of parental gross misconduct, unfitness, or other extraordinary circumstances affecting the welfare of the child).

They also argue that the triggering mechanism in this case, comparable to the triggering mechanisms of the ch. 767 visitation statute, is the disruption of the child's life by the elimination of his relationship with a parent-like person. They urge that the state's intervention to act in the child's best interest is justified because, as the child's guardian ad litem asserted at oral argument, the biological mother "exercised her constitutional rights to include another adult to act as a parent"[38] but she is now substantially interfering in the child's relationship with this adult.

[8] As we have said, we agree with the positions of the guardian ad litem and Holtzman. Mindful of preserving a biological or adoptive parent's constitutionally protected interests and the best interest of a child, we conclude that a circuit court has equitable power to hear a petition for visitation when it determines that the petitioner has a parent-like relationship with the child and that a significant triggering event

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[38]Oral argument, October 12, 1994.

justifies state intervention in the child's relationship with a biological or adoptive parent. To meet these two requirements, a petitioner must prove the component elements of each one. Only after the petitioner satisfies this burden may a circuit court consider whether visitation is in the best interest of the child.

[9] To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by ***436** taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial

compensation;[39] and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

[10] To establish a significant triggering event justifying state intervention in the child's relationship with a biological or adoptive parent, the petitioner must prove that this parent has interfered substantially with the petitioner's parent-like relationship with the child, and that the petitioner sought court ordered visitation within a reasonable time after the parent's interference. The petitioner must prove all these elements before a circuit court may consider whether visitation is in the best interest of the child.

We conclude that the cause should be remanded to the circuit court to determine whether Holtzman can prove these

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[39]A petitioner's contribution to a child's support need not be monetary.

elements.[40] If the circuit court finds,

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[40]Through consent, a biological or adoptive parent exercises his or her constitutional right of parental autonomy to allow another adult to develop a parent-like relationship with the child. In this case, on the basis of the record before us, a circuit court could find that Knott had consented to and fostered Holtzman's formation and establishment of a parent-like relationship with the child, thereby sharing her parental rights. Several facts point to this consent including the parties' agreement about the conception of the child, the dedication ceremony naming both parties as the child's parents, and the child's name. An ongoing course of conduct by which Knott fostered Holtzman's parent-like relationship with the child can be demonstrated by these facts, as well as others such as Holtzman's care of the child and the child's close relationship with members of Holtzman's family. An agreement between the parties could also indicate an adoptive or biological parent's consent to another to establish a parent-like relationship with the child. For the

after applying the four-part test we prescribe, that Holtzman has proved that she has a parent-like relationship with the child and that a significant triggering event occurred demonstrated by Knott's substantial interference with the child's relationship with Holtzman and by Holtzman's prompt petition to the court after Knott's interference, it must then determine whether visitation is in the best interest of the child.

This exercise of equitable power protects parental autonomy and constitutional rights by requiring that the parent-like relationship develop only with the consent and assistance of the biological or adoptive parent. It also protects a child's best interest by preserving the child's relationship with an adult who has been like a parent.

Support for this approach is found in the legislative policy underlying the visitation statutes and the case law of

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distinctions among express, implied- in-fact, and quasi contracts between two unmarried partners, see *Watts v. Watts*, 137 Wis.2d 506, 405 N.W.2d 303 (1987).

other jurisdictions, as well as in scholarly commentary.

The underlying legislative policy expressed in the three visitation statutes and the case law is to protect biological and adoptive parents' constitutional right to rear their children free of unnecessary state intervention. The legislature and courts have insisted that a person petitioning for visitation under the statutes point to a triggering event to justify state intervention in a parent-child relationship. In this case, the best interest of a child may override a parent's right when a parent consents to and fosters another person's establishing a parent-like relationship with a child and then substantially interferes with that relationship. In both the visitation statutes and the approach in this case, a triggering event notifies the state that intervention into the constitutionally protected realm of parent and child might be warranted to protect a child's best interest.

The case law of other states provides further support for our decision. Other courts have recognized the importance of the establishment of a person's

parent-like relationship with a child based on the consent and conduct of the child's biological or adoptive parent. In facts parallel to those of this case, the New Mexico court of appeals concluded that the trial court erred in determining that an agreement concerning a child that two women had co-parented for seven ***437** years was, as a matter of law, against the best interest of the child. *A.C. v. C.B.*, 113 N.M. 581, 829 P.2d 660, 664 (Ct.App.1992), cert. denied 113 N.M. 449, 827 P.2d 837 (N.M.1992).

In *Karin T. v. Michael T.*, 127 Misc.2d 14, 484 N.Y.S.2d 780 (Fam.Ct.1985), the biological mother's female partner signed a statement agreeing to consider the offspring of the mother's artificial insemination to be the partner's "own legitimate child." The court concluded that the partner was liable for child support based on the artificial insemination agreement, finding that "[t]he contract and the equitable estoppel which prevail in this case prevent the respondent from asserting her lack of responsibility by reason of lack

of parenthood."[41] *Id.* 484 N.Y.S.2d at 784.

Finally, legal commentators recognize the significance of a biological or adoptive parent's consent to permit another adult to establish a parent-like relationship with a child. See Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother

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[41]See also *In re Marriage of Gayden*, 229 Cal.App.3d 1510, 1521-22, 280 Cal.Rptr. 862 (Ct.App.1991). Two decisions, both based on statutory grounds, have denied petitioners custody or visitation of children born to their former partners by artificial insemination. See, e.g., *Nancy S. v. Michele G.*, 228 Cal.App.3d 831, 279 Cal.Rptr. 212, 217 (Ct.App.1991) (refusing to grant nonparent visitation or custody but intimating that a nonparent could jointly adopt the child with the biological parent of the same sex, a remedy not permitted in Wisconsin); *In the Matter of Alison D. v. Virginia M.*, 77 N.Y.2d 651, 569 N.Y.S.2d 586, 588, 572 N.E.2d 27, 29 (App.1991) (refusing to grant standing to mother's live-in partner to seek visitation).

and Other Nontraditional Families, 78 Geo.L.J. 459, 464 (1990) (arguing that parental autonomy and the best interests of children would be preserved by recognizing as a parent "anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature"); Comment, Kristine L. Burks, Redefining Parenthood: Child Custody and Visitation When Nontraditional Families Dissolve, 24 Golden Gate U.L.Rev. 223, (1994) (positing that a nonparent be able to seek custody and visitation when, inter alia, that person has developed a parent-child relationship with a child with the support and cooperation of the legally recognized parent).

To summarize our decision, we conclude the following: Holtzman has not raised a triable issue requiring a transfer of custody, and therefore we affirm the dismissal of the custody action commenced under sec. 767.24, Stats. 1991-92. Holtzman cannot petition for visitation of Knott's child under sec. 767.245, Stats. 1991-92, but the

legislature did not intend the statute to supplant or preempt the subject of visitation or the equitable powers of the court to determine visitation under circumstances not included within the statute. A circuit court may determine whether visitation with Holtzman is in the child's best interest if Holtzman first proves under the four part test that she has a parent-like relationship with the child; and if Holtzman proves a significant triggering event by demonstrating that Knott has interfered substantially with the child's relationship with Holtzman, and that Holtzman petitioned the court promptly after Knott's interference.

For the reasons set forth, that part of the order of the circuit court dismissing the petition for custody is affirmed, that part of the order dismissing the petition for visitation rights is reversed, and the cause is remanded for proceedings consistent with this opinion.

The order of the circuit court is affirmed in part and reversed in part and the cause remanded.

BABLITCH, Justice, concurring.

I join both the reasoning and the result of the majority opinion. I write to address the dissents, emphasizing that the issue in this case is not, or at least should not be, sexual orientation or sexual relationships. My focus is on the completely innocent victim in this case, and the thousands of others like him: the children of dissolving non-traditional relationships. The issue is the best interests of these children, and the role of the court in protecting them.

*438 The dissents totally ignore the access (i.e. visitation) interests of the one undisputable victim in this case, the child. Having been victimized by the dissolving relationship of the two people who raised him, the dissents would victimize the child once more by denying him any relationship with one of the two people he has come to love and cherish. It is through no fault of this child that he finds himself where he is today. Yet the dissents, two of which accuse the majority of legislating a result, themselves legislate the courts right out of any role in protecting access rights for children of dissolving non-traditional

families.

The majority opinion and the dissents are in agreement with respect to one facet of this case: the legislature is silent when it comes to the access interests of the children of a dissolving non-traditional family. The dissents would leave the courts powerless in the face of this legislative silence. The dissents' unspoken but inevitable conclusion is that this legislative silence evinces a legislative intent that the best interests of these children have no protection whatsoever when it comes to access to the people who have raised them. The dissents would have us believe that the legislature intends these children to somehow engage in a societal Dickensian drift, with both the children and possibly society paying what could be an incalculable price for the errors of others. I do not believe the legislature could intend that harsh a result. Far more reasonable is the conclusion of the majority opinion that children of dissolving non-traditional families have interests that can be protected by the courts in matters of access.

The majority opinion does not mandate

access. To the contrary, the majority opinion leaves the decision to grant or deny visitation to the circuit court's discretionary determination of what is in the best interest of the child. That is completely consistent with the legislature's repeated admonishments to the courts that when it comes to children we must keep uppermost in our minds the best interests of the children. The dissents would lead us to believe, however, that when it comes to children of dissolving relationships the legislature is concerned only with the best interests of children of traditional families. I reject that conclusion.

I am authorized to state that Chief Justice NATHAN S. HEFFERNAN, Justice SHIRLEY S. ABRAHAMSON, and Justice JANINE P. GESKE join in this concurrence.

DAY, Justice, concurring and dissenting.

I join in the very well written concurring and dissenting opinion by Justice Steinmetz. I write separately to emphasize certain points.

There is nothing in this case that warrants the deprivation of the rights of

this biological mother to determine what is in her child's best interests and to decide who will and will not have visitation with her child. Neither marriage nor blood ties justifies this courts' creation of an arrangement not recognized until today. There was no marriage--the "ceremony" gone through by the mother and her former companion is a nullity--it is completely unrecognized in our law. To give any importance to the "ceremony" by these two women should require an act of the legislature, not an aberrant opinion by this court.

Contrary to the position taken by Ms. Holtzman's attorney in seeking visitation rights under Chapter 767 of the Wisconsin statutes, the majority recognizes, "... Holtzman is in error. Section 767.24 Stats. 1991-92 does not apply to the facts of this case. The legislature enacted the Ch. 767 visitation statute with the dissolution of marriage in mind. This case does not involve a marriage or its dissolution." Majority op. at 425. The majority opinion devotes several pages supporting that conclusion, ending its discussion of the statute as follows: In short, the legislature did not intend the

ch. 767 visitation statute to apply in the absence of the dissolution of marriage.... The circuit court appropriately refused to stretch the statute to fit in the absence of a dissolved marriage. Accordingly, we conclude that Holtzman's reliance on sec. 767.245 is misplaced. Majority op. at 430.

The majority opinion should end there!

Instead, it takes the majority thirty-five paragraphs and fifteen footnotes from there ***439** on to create its new vision of family law in a way that should only be done by the legislature. Along the way, it cites many cases contrary to its new found theories. However, its only apparent purpose for doing so is so it can ignore or overrule them as is so ably discussed by Justice Steinmetz.

There is no statutory justification or provision to deny this biological mother, who with her child is an "intact family" under our prior rulings, the control over her child. In the law up until today, no one in the position of Ms. Holtzman could interfere with the right of the child's mother to determine who will visit or associate with her child. As one

of the present majority said recently in a concurrence in *In re Angel Lace M.*, 184 Wis.2d 492, 516 N.W.2d 678 (1994): The legislators, as representatives of the people of this state, have both the right and the responsibility to establish the requirements for a legal adoption, for custody, and for visitation. This court cannot play that role. We can only interpret the law, not rewrite it. *Id.* at 520, 516 N.W.2d 678 (Geske, J., concurring) (emphasis supplied). Justice Geske was right. The visitation statute is the sole means of obtaining state sanctioned visitation rights. [FN1] The majority disputes this fact by repeating several times that the statute does not preempt the courts' "equitable power" over visitation. The majority persists in this claim:

FN1. The majority argues that *Watts v. Watts*, 137 Wis.2d 506, 405 N.W.2d 303 (1987), supports the position that the legislative intent of ch. 767 may be applied to non-marital situations. Watts is completely irrelevant to determining the legislative intent behind ch. 767. The key element to the majority's

discussion of this case, and to the holding of the case, is that it involved contract and property rights. That the two parties were involved in a "relationship" and that they "held themselves out as husband and wife" was only used as a misguided attempted defense to the contractual claims. In contrast, here the majority bases its entire decision on the relationship between Holtzman and Knott. Absent this relationship, Holtzman would not, even under the majority's tortured analysis, have standing to seek visitation. Thus, in Watts this court simply held that express and implied in fact contracts to share property will be enforced. As the Watts court noted, if such an agreement did not exist, the parties would have no recourse in the courts.

'Till their own dreams
at length deceive 'em
And oft repeating
they believe 'em.
Mathew Prior (1664-1721).

The majority attempts to distinguish visitation from adoption and custody by stating that, unlike adoption and custody,

this court has not expressly stated that the visitation statute supplanted the common law. This is not correct. In *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 471 N.W.2d 202 (1991), after detailing the statutory requirements for standing under the much modified, current visitation statute, [FN2] this court held that a contract that purported to grant custody and visitation rights was void "[b]ecause we conclude that the legislative intent grants custody and visitation rights to non-parents only under the circumstances described above." *Z.J.H.*, 162 Wis.2d at 1024, 471 N.W.2d 202 (emphasis added).

FN2. 1987 Wis. Act 355.

Moreover, it is far from clear which direction the legislature would go if it were to examine the issue presented here. Even in countries that have legalized same sex marriages, legislatures have restricted the rights of those couples where children are concerned. For example, Sweden, Denmark and Norway have all legalized same-sex marriages; however, the legislatures in all of these countries made it illegal for couples in

same-sex marriages to adopt children or have children by artificial insemination. Lawrence Ingrassia, Danes Don't Debate Same-Sex Marriages, They Celebrate Them, Wall St. J., June 8, 1994, at A1, A8. If anything, the intent of the legislature seems to be contrary to the majority's opinion. As pointed out by Justice Steinmetz, the legislature has reacted swiftly to decisions from this court with which it does not agree. Steinmetz, J., concurring and dissenting op. at 445 n. 7. The most recent example is a bill already passed by the Senate, 1995 Senate Bill 13, and currently in Committee in the Assembly, which would amend the current ***440** visitation statute so that visitation may be ordered in cases with facts similar to those in *In re the Marriage of Cox*, 177 Wis.2d 433, 502 N.W.2d 128 (1993) (stepparent sought standing to seek court-ordered visitation of the child of her deceased husband and his first wife). This bill is not as important to this case for what it says as it is for what it does not say. While it expresses dissatisfaction with this court's holding in Cox, if passed it would not eliminate the requirement that an action affecting

the family exist for a party to gain standing nor would it in any way state disapproval with the public policy arguments that this court made in *Z.J.H.*, 162 Wis.2d 1002, 471 N.W.2d 202 (1991) (holding that "legislative intent grants custody and visitation rights to non-parents only under [the statute]" and stating that public policy concerns "militate against contractual provisions affecting th[e] relationship [between a natural or adoptive parent and that parent's child]."), or *Angel Lace*, 184 Wis.2d at 495, 516 N.W.2d 678 (holding that the Wisconsin adoption statutes did not allow a third party to adopt the minor child of the third party's same sex nonmarital partner).

Ms. Holtzman may very well love Ms. Knott's child and feel that what she wants is in the child's best interests. But, so we must assume the same feelings and intent on the part of the child's mother.

The courts and the legislature heretofore have correctly held under similar facts that the mother is the one who should make the determination of what visitation is in her child's best interests. California's Court of Appeal,

First District has recently aptly summarized the reasoning behind the grant of a veto right over third party visitation to biological and adoptive parents as follows: Providing parents a superior ability to influence the upbringing of their child is clearly in the interests of the child. By diminishing the likelihood of struggle between parents and others close to the child with whom the parents are at cross-purposes, the parental preference minimizes the likelihood the child will be exposed to hostility between those with whom he has a strong attachment, which can cause distress, create loyalty dilemmas and be disruptive to the child's socialization experiences. (Emery, Marriage, Divorce and Children (1988) at pp. 94-98, and other authorities there cited and discussed.) Recent empirical studies suggest that in many instances sustained exposure to ongoing conflict may cause children more psychological distress and adjustment difficulties than separation from an attachment figure involved in the conflict. (See Johnston, Kline & Tschann, On-Going Post Divorce Conflict: Effects on Children of Joint

Custody and Frequent Access, 59 Am.J. of Orthopsychiatry 576 (1989)). *In re the Marriage of Gayden*, 229 Cal.App.3d 1510, 1517, 280 Cal.Rptr. 862 (1991). [FN3]

FN3. One can hardly fail to note the antagonism that exists between Ms. Holtzman and Ms. Knott. That is why the law, up to now, has wisely left it to the biological or adoptive parent to determine whether visitation is in the best interest of his or her own child. This has been true regardless of what the motive may be, good or bad, of a third party in seeking visitation. Thus, contrary to the statement in Justice Bablitch's concurrence, my conclusion is not that legislative silence "evinces a legislative intent that the best interests of these children have no protection whatsoever." Bablitch, J., concurring op. at 438. Rather, my conclusion is that the legislative silence evinces an intent that the child's best interests are best determined by the child's biological or adoptive parent instead of by the courts.

Further, although the majority states that it was "mindful of preserving a

biological or adoptive parent's constitutionally protected interests," majority op. at 420, in reaching its conclusion, the majority nevertheless trammels those rights. In *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), the United States Supreme Court, after acknowledging the potential for parents to act contrary to the best interests of their child, concluded that if a parent's childraising method does not "jeopardize the health or safety of the child, or have a potential for significant social burdens" the state shall not interfere. *Id.* at 234, 92 S.Ct. at 1542 (emphasis supplied). [FN4] The majority opinion ***441** is directly contrary to this mandate because Ms. Knott's decision to not permit Ms. Holtzman visitation rights has not been shown to have jeopardized the health or safety or to have a potential for significant social burdens on her child. [FN5] Thus, the majority opinion unconstitutionally deprives this mother of an important right. Contrary to the majority opinion, the child here does not need the "protection of the courts." Majority op. at 421. His mother is the one who should

have had the courts protecting her right to raise her own child and to determine what is in her child's best interests.

FN4. *Gotz v. Gotz*, 274 Wis. 472, 80 N.W.2d 359 (1957), is not to the contrary. In that case, the court allowed visitation of the child's aunts to continue despite the objections of the biological father who had indefinite temporary custody of the child due to the mother's poor health. The court did not hold that the aunts had an independent right to visitation. Instead, the court upheld the visitation because it found the aunts to be the representatives of the biological mother, who had permanent custody of the child but who could not visit the child herself as she was residing in another state. *Id.* at 477, 80 N.W.2d 359.

FN5. Further, given that the majority throws out Ms. Holtzman's custody claim because she did not present sufficient evidence to show that Ms. Knott is unfit and unable to care for her child, it is unlikely that Ms. Knott's decision to deny Ms. Holtzman visitation could ever be shown to have jeopardized the health or

safety or to have had a potential for significant social burdens on Ms. Knott's child.

The concern expressed by Justice Bablitch is that "the dissents would victimize the child once more by denying him any relationship" with Ms. Holtzman and that the dissents leave "these children ... in a societal Dickensian drift, with both the children and possibly society paying what could be an incalculable price for the errors of others." Bablitch, J., concurring op. at 437-438. But, this child is in no "societal drift," Dickensian or otherwise. This child is no "Oliver Twist"--he is not an orphan, he has a mother. Thousands and thousands of single parents, widows and widowers from time immemorial have raised children and made the choices parents have always had to make that are part of raising, supporting and nurturing their children, including deciding with whom their child shall associate. And, they have done so without government interference. This mother has a constitutional right to do the same.

In an attempt to obscure the result

oriented nature of the opinion, the majority creates four "criteria" out of whole cloth to give some legal gloss to its new creation. The majority should have taken heed of the warning given in a similar case in which a court refused to redefine the word "parent" in a visitation statute: [E]xpanding the definition of 'parent' in the manner advocated by the appellant could expose other natural parents to litigation brought by child-care providers of long standing, relatives, successive sets of stepparents or other close friends of the family. No matter how narrowly we might attempt to draft the definition, the fact remains that the status of individuals claiming to be parents would have to be litigated and resolution of these claims would turn on elusive factual determinations of the intent of the natural mother, the perceptions of the children, and the course of conduct of the party claiming parental status. By deferring to the Legislature in matters involving complex social and policy ramifications far beyond the facts of the particular case, we are not telling the parties that the issues they raise are unworthy of legal

recognition. To the contrary, we intend only to illustrate the limitations of the courts in fashioning a comprehensive solution to such a complex and socially significant issue. Nancy S. v. Michele G., 228 Cal.App.3d 831, 279 Cal.Rptr. 212, 219 (1991).

Moreover, the majority creates its law under the rubric of the "court's longstanding equitable power to protect the best interest of a child." If it is the courts and not the legislature who are to define the factual situations that "equity" requires granting visitation, everyone could have standing in any case in which they allege that the best interests of a child are at issue. That is, if the courts can, in any given case, state that the facts of a case create a "triggering event" which enables the court to exercise its "equitable powers," doesn't every case involving a child potentially come down to an amorphous "best interests" analysis regardless of the decisions made by one, or both, of the child's biological or adoptive parents? Anything *442 goes that a court may claim is "in the best interest of the child"!

The potential for this problem is

highlighted in Justice Bablitch's concurrence. He states that "children of dissolving non-traditional families have interests that can be protected by the courts in matters of access." Bablitch, J., concurring op. at 438. To state the proposition is to illustrate why the majority opinion is wrong. "Non-traditional family" is not defined. Is it a temporary monogamous couple of one sex or may it include a temporary heterosexual couple? May it be comprised of more than two people so as to be polygamous, and if so, how many? Do all persons claiming a "right" to visitation have to be sexually involved with the biological parent to be part of the non-traditional family or can the relationship between some or all of the adults be non-sexual? All these various living arrangements can be lumped into the term "non-traditional family." That is why the legislature should be the body that decides what groupings of adults living together may be defined as a "non-traditional family" and then define what rights a member of such an arrangement may have with the children of another member of such a "non-

traditional" group.

There is no justification for a court to seek to impose in the name of the law, common or equitable, its own ideas of social policy and a new found theory of family law which creates new "rights" for those who have no legally binding relationship to the child (for instance, no duty of support). This is especially true when doing so requires overruling its own cases interpreting controlling statutory authority. Changes in family law as drastic as those created here should only be done by the legislature following full hearings and debate by ninety-nine Representatives, thirty-three Senators and the Governor.

The majority opinion is a bad example of legislation by judicial fiat.

I concur with that part of the opinion dismissing the custody petition of Ms. Holtzman and dissent from that part of the opinion allowing her to seek visitation.

STEINMETZ, Justice, concurring in part, dissenting in part.

The proper function of a state court is to apply the law that is declared by

the popularly elected legislators of its state and of the United States, ensuring that constitutional rights are not trammeled by individuals, business entities, or the government. A state court functions at its lowest ebb of legitimacy when it not only ignores constitutional mandates, but also legislates from the bench, usurping power from the appropriate legislative body and forcing the moral views of a small, relatively unaccountable group of judges upon all those living in the state. Sadly, the majority opinion in this case provides an illustration of a court at its lowest ebb of legitimacy.

The United States Supreme Court has repeatedly recognized that under the Fourteenth Amendment to the constitution, [FN1] biological and adoptive parents have a constitutionally protected "fundamental right" to raise their children free from unnecessary intrusion by the government. [FN2] In doing so, ***443** the Court has identified a "private realm of family life [into] which the state cannot enter." *Barstad v. Frazier*, 118 Wis.2d 549, 568, 348 N.W.2d 479 (1984) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct.

438, 442, 88 L.Ed. 645 (1944)).

FN1. Although the constitutional protection of parental autonomy is rooted primarily in the due process clause of the Fourteenth Amendment, the Supreme Court has stated that the right of parents to raise their children free from state intervention also finds support in the equal protection clause of the Fourteenth Amendment and in the privacy guarantees of the Ninth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551 (1971) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942) (equal protection clause); *Griswold v. Connecticut*, 381 U.S. 479, 496, 85 S.Ct. 1678, 1688, 14 L.Ed.2d 510 (1965) (Goldberg, J., concurring) (privacy guarantees)).

FN2. See *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923); see also *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 111 L.Ed.2d 344 (1990); *Board of Educ. v. Mergens*, 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Michael v. Gerald D.*, 491

U.S. 110, 118-19, 109 S.Ct. 2333 (1988); *Lehr v. Robertson*, 463 U.S. 248, 257-58, 103 S.Ct. 2985, 2991, 77 L.Ed.2d 614 (1982); *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944), reh'g denied, 321 U.S. 804, 64 S.Ct. 784, 88 L.Ed. 1090 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights ...' and ... 'far more precious ... than property rights.' 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can

neither supply nor hinder.' *Stanley*, 405 U.S. at 651, 92 S.Ct. at 1212 (citations omitted); see also *Barstad*, 118 Wis.2d at 567, 348 N.W.2d 479 (recognizing that "a natural parent has a protected right under both state law and the United States Constitution to rear his or her children free from governmental intervention").

Thus, absent narrowly defined, compelling circumstances, the legal parent of a child is constitutionally entitled to decide whether visitation by a nonparent is in the best interest of the child. As the majority concedes, op. at 429, a court may not impinge upon that right simply because it believes that visitation would be in the best interest of the child; absent compelling circumstances, the parent's decision controls. Cf. *Barstad*, 118 Wis.2d at 567-68, 348 N.W.2d 479 (holding that courts should not displace a fit and able parent for a nonparent simply because the court believes the nonparent could do a better job of parenting); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 555, 54 L.Ed.2d 511 (1977) (stating that "the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural

family ... for the sole reason that to do so was thought to be in the children's best interest' ") (citation omitted); *Moore v. East Cleveland*, 431 U.S. 494, 502, 97 S.Ct. 1932, 1937, 52 L.Ed.2d 531 (1977) (stating that the mere vote of a majority of a court regarding a child's best interests can be a danger to due process); *Cooper v. Merkel*, 470 N.W.2d 253, 255-56 (S.D.1991) (stating that "in order to grant a nonparent visitation rights with a minor child over the wishes of a parent, a clear showing against the parent of gross misconduct, unfitness or other extraordinary circumstances affecting the welfare of the child is required").

Section 767.245, Stats., as consistently interpreted by the courts of this state, [FN3] sets forth the compelling circumstances that must exist before the state may interfere with a parent's decision to deny visitation to a nonparent. These circumstances were first identified in *Van Cleve v. Hemminger*, 141 Wis.2d 543, 415 N.W.2d 571 (Ct.App.1987). There, the court of appeals noted that the standing requirements under sec. 767.245, Stats., were ambiguous when the statute

was read in light of related statutes. After reviewing the legislative history of the statute, the court of appeals held:

FN3. The majority opinion states that "courts have reached no consensus about which statutorily-defined 'actions affecting the family' suffice to meet the court-imposed 'actions affecting the family' requirement with respect to petitions for visitation." Majority op. at 429. The majority provides no support for this assertion. Instead, it cites to the dissenting opinion in *Cox*, 177 Wis.2d 433, 502 N.W.2d 128. A dissenting opinion does not change the law or demonstrate a lack of consensus on the part of "courts" throughout the state.

It is obvious ... that the legislature did not intend that the state intervene in the parents' decisions regarding their children's best interest when the family unit is intact. We, therefore, construe the right [of visitation] created in sec. 767.245(4) [now 767.245(1)] to be limited in its application to those cases where an underlying action affecting the family

unit has previously been filed. .... In the absence of such factors, however, there is no justifiable reason for the state to override determinations made by parents as to what is in the best interests of their children. ***444** Van Cleve, 141 Wis.2d at 549, 415 N.W.2d 571. (Emphasis added.)

In 1991, the legislature reviewed the law of visitation and enacted sec. 48.925, Stats., which authorizes courts to grant reasonable visitation privileges to relatives who have maintained a relationship similar to a parent- child relationship with a child who has recently been adopted. See 1991 Wis. Act 191. The legislature enacted sec. 48.925 in direct response to our decision in *In re Marriage of Soergel*, 154 Wis.2d 564, 453 N.W.2d 624 (1990), in which we denied visitation to a relative under sec. 767.245(1). In enacting sec. 48.925, the legislature was cognizant of the *Van Cleve* decision. By not altering the decision, the legislature placed its stamp of approval on it. See *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 1023, 471 N.W.2d 202 (1991) (stating that in amending the statute the legislature did not express an intent to grant

visitation of a child in an intact family unit).

In *Soergel*, this court approvingly cited the *Van Cleve* court's interpretation of sec. 767.245, Stats. Shortly thereafter, this court formally adopted the *Van Cleve* court's requirements for seeking visitation under sec. 767.245. See *Z.J.H.*, 162 Wis.2d at 1022-23, 471 N.W.2d 202. Even the dissent in *Z.J.H.* acknowledged that "Van Cleve is a well reasoned opinion." *Id.* at 1032, 471 N.W.2d 202 (Bablitch, J., dissenting). Most recently, in *In re Marriage of Cox v. Williams*, 177 Wis.2d 433, 502 N.W.2d 128 (1993), we again adhered to the Van Cleve court's requirements for standing, summarizing the compelling circumstances necessary for the state to intervene in a parent's decision regarding the best interests of his or her child as follows: A person has standing to seek nonparent visitation under sec. 767.245(1), Stats., when two circumstances are present: first, an 'underlying action affecting the family unit has previously been filed'; and second, the child's family is nonintact, so that it may be in the child's best interests to order visitation

'to mitigate the trauma and impact of [the] dissolving family relationship.' *Cox*, 177 Wis.2d at 439, 502 N.W.2d 128 (emphasis added) (citing *Z.J.H.*, 162 Wis.2d at 1020-23, 471 N.W.2d 202; *Van Cleve*, 141 Wis.2d at 549, 415 N.W.2d 571).

In the instant case, the requisite compelling circumstances are conspicuously absent; therefore, the state should not interfere with Knott's decision to deny visitation to Holtzman, a biological stranger who is not a legal parent. Holtzman has not shown that an underlying action affecting the family has been filed, nor has she shown that the family unit is dissolving or nonintact. In *Cox*, this court held that an intact family can consist of a biological mother and her child. *Cox*, 177 Wis.2d at 440, 502 N.W.2d 128. To hold otherwise would be a loss for all single-parent families. Knott and her biological child are an intact family. By substituting their judgment for Knott's when no compelling circumstances are present, the majority infringes upon Knott's constitutionally protected right to determine what is in the best interest of her biological child and raise him free from state intervention. I acknowledge

that such decisions are not always wisely made; nevertheless, absent compelling circumstances, we must respect an intact family's decisions regarding the best interests of a child. See *Van Cleve*, 141 Wis.2d at 549- 50, 415 N.W.2d 571.

The majority correctly concludes that Holtzman lacks standing to bring an action to obtain custody of Knott's biological child, because Holtzman has neither raised a triable issue regarding Knott's fitness or ability to parent her child, nor shown compelling circumstances requiring a change of custody. Majority op. at 421, 423-424. The majority states that "[t]he concept of 'standing' is used in custody actions to mean that the petitioner 'has status to bring an action for custody under the applicable statute.' " Majority op. at 423 (quoting Z.J.H., 162 Wis.2d at 1008 n. 3, 471 N.W.2d 202) (emphasis added). Thus, with respect to custody actions, the majority acknowledges that circuit courts are bound by the law as declared by the legislature of this state.

However, with respect to visitation actions, the majority opines that circuit courts may disregard the applicable statute and invoke their "equitable power"

to order visitation. The majority reasons that sec. 767.245, ***445** Stats., applies only when a "marriage" is dissolving. Majority op. at 430. Holtzman and Knott are not legally married, nor could they be under the laws of this state. [FN4] Hence, according to the majority, the statute does not apply to this case. Majority op. at 430.

FN4. The fact that two people of the same sex make a commitment to each other, exchange vows and rings in a private ceremony, and are named as a child's parents at the child's religious dedication ceremony is all irrelevant to the issue of visitation.

In fact, the statute does apply to this case. It simply does not yield the result desired by the majority. The statute unequivocally applies to a person, such as Holtzman, "who has maintained a relationship similar to a parent-child relationship with the child." Section 767.245, Stats. [FN5] As stated earlier, the courts of this state have consistently interpreted the statute and held that a person lacks standing to bring a

visitation action unless an underlying action affecting the family has been filed and the family is dissolving. *Cox*, 177 Wis.2d at 439, 502 N.W.2d 128; *Z.J.H.*, 162 Wis.2d at 1020-23, 471 N.W.2d 202; *Van Cleve*, 141 Wis.2d at 549, 415 N.W.2d 571. Section 767.02(1), [FN6] lists various actions "affecting the family." Most of these are actions involving the dissolution of a marriage. The break-up of a non-legally protected, non-traditional relationship is not listed as an action affecting the family. This is not an oversight on the part of the legislature.

FN5. In *Soergel*, we recognized that the statute was amended for the very purpose of making the statute applicable to persons who had maintained a parent-like relationship with the child. *Soergel*, 154 Wis.2d at 567 n. 2, 453 N.W.2d 624.

FN6. Section 767.02(1), Stats., provides: Actions affecting the family are: (a) To affirm marriage. (b) Annulment. (c) Divorce. (d) Legal separation (formerly divorce from bed and

board). (e) Custody. (f) For child support, including an action under s. 767.65. (g) For maintenance payments. (h) For property division. (i) To enforce or modify a judgment or order in an action affecting the family granted in this state or elsewhere. (j) For periodic family support payments. (k) Concerning periods of physical placement or visitation rights of children. (l) To determine paternity. (m) To enforce or revise an order for support entered under s. 48.355(2)(b)4., 48.357(4m) or 48.363(2).

The legislature is presumed to be aware of this court's decisions interpreting the visitation statute and, thus, is presumed be aware that in order to have standing in a visitation action, a nonparent must show that an action affecting the family has been filed. *Z.J.H.*, 162 Wis.2d at 1023, 471 N.W.2d 202 (citing *Zimmerman v. Wisconsin Elec. Power Co.*, 38 Wis.2d 626, 634, 157 N.W.2d 648 (1968)). If the legislature had intended to allow visitation in a case such as this, it could very easily have inserted a provision into sec. 760.02, Stats., stating that an action affecting the

family includes the break- up of a non-legally protected and non-traditional relationship or the severing of an implicit child-rearing agreement between two non-married people. The legislature did not do so. [FN7]

FN7. Dissenting in *In Interest of Angel Lace M.*, 184 Wis.2d 492, 516 N.W.2d 678 (1994), Justice Bablitch argued that the legislature is not responsive to issues such as the one present in this case and, therefore, this court should assume a certain amount of the legislative responsibility. However, the history of visitation law in Wisconsin does not bear this out. With respect to our prior decisions regarding visitation rights, the legislative response has been swift and direct. For example, the grandparent visitation statute was created shortly after our decisions in *Weichman v. Weichman*, 50 Wis.2d 731, 184 N.W.2d 882 (1971), and *Ponsford v. Crute*, 56 Wis.2d 407, 202 N.W.2d 5 (1972). Another example is 1991 Wis. Act 191, which effectively overruled our decision in *In re Marriage of Soergel*, 154 Wis.2d 564, 453 N.W.2d 624 (1990). Finally, as discussed in detail in

Justice Day's dissent, the Senate recently passed 1995 Senate Bill 13 in direct response to our decision in *Cox*, 177 Wis.2d 433, 502 N.W.2d 128. Thus, contrary to the position taken by Justice Bablitch, the legislature has not silently sat and ambivalently watched this court develop the law of visitation. The legislature has closely followed this court's visitation law decisions, and it has spoken loudly when it disagreed with those decisions. For us to legislate in an area of law through four justices is a dangerous practice. The legislature is equally aware of the changes in society and may be relied on to act when legislation is required.

Both this court and the United States Supreme Court have previously stated that the ***446** "usual understanding of 'family' implies biological relationships, and most decisions treating the relation between parent and child have stressed this element." *Cox*, 177 Wis.2d at 440, 502 N.W.2d 128 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 843, 97 S.Ct. 2094, 2109, 53 L.Ed.2d 14 (1977)). Again, the legislature is presumed to be

aware of our prior decisions and of those by the Supreme Court. The legislature could have easily inserted a provision into sec. 767.001, Stats. (definitions), broadly defining the term "family" to include non-legally protected, non-traditional relationships. The legislature did not do so. Instead, consistent with the usual understanding of "family," the legislature has expressed a clear intent to promote and protect only those relationships with a biological, adoptive, or marital connection.

In a decision authored by Justice Abrahamson, this court reiterated that "[i]t is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family.... Marriage is the institution that is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and the state." *Watts v. Watts*, 137 Wis.2d 506, 518-19, 405 N.W.2d 303 (1987) (emphasis in original) (quoting sec. 765.001(2), Stats.). Continuing, the court stated that "the legislature not only intended chs. 765-68 to protect and promote the 'family,' but also intended 'family' to be

within the 'marriage' context." *Id.* at 519, 405 N.W.2d 303. In light of the fact that Wisconsin does not recognize marriages between individuals of the same sex, it seems implausible to suggest that the legislature intended to recognize such relationships as a family unit.

This does not mean, as the concurrence suggests, that I believe the legislature is concerned only with the best interests of children of traditional families. It simply means that the legislature has determined, consistent with the constitutional rights of biological parents, that when two people terminate a nontraditional relationship in which a child has been raised, the biological parent is entitled to determine whether it is in the best interest of the child to continue seeing the biological stranger.

The legislators of this state, representing the views of their constituents, have consciously decided not to protect or promote non-traditional, non-legally binding relationships, apparently believing that such relationships are not basic to morality and civilization. [FN8] Accordingly, the

break-up of such a relationship cannot be deemed a "triggering event" sufficient to justify impinging upon a biological parent's constitutional right to raise his or her child free from state intervention. The majority disagrees with this legislatively declared social policy and, therefore, rewrites the law to reflect its own moral views and to facilitate its predetermined legal conclusion.

FN8. Holtzman knew that Wisconsin did not recognize same sex marriages. Thus, she could not have had a reasonable expectation that she would eventually acquire legal parental status in this state.

The majority concludes that "the legislature did not intend sec. 767.245 either to be an exclusive grant of power to the courts to determine visitation or to limit the courts' equitable power to protect the best interest of a child by ordering visitation." Majority op. at 430. The majority provides three unsatisfactory justifications for its conclusion.

First, the majority notes that on at

least two occasions, this court granted visitation before the visitation statutes were promulgated. Majority op. at 430. Because the court's power to grant visitation is not statutory in origin, the majority concludes that its power over visitation is not limited by the existing visitation statutes. Majority op. at 430. However, the fact that courts exercised a self-bestowed power to order visitation at a time when no statutes were in existence does not mean that courts now have the power to order visitation when doing so is contrary to existing statutes. As discussed above, ordering visitation in this case is contrary to sec. 767.245, Stats.

Second, the majority reasons that nothing in the visitation statutes or their legislative history states or implies that they were intended to displace the courts' "equitable power" over visitation. Majority op. at 430. The *447 majority then concludes that because the visitation statutes provide for visitation only under limited circumstances, it is reasonable to infer that courts may order visitation under other circumstances. Majority op. at 430-

431. This is absurd. The statutes provide for visitation only under limited circumstances because biological and adoptive parents have a constitutionally protected right to raise their children free from unnecessary governmental intrusion. The statutes seek to draw an appropriate line between necessary and unnecessary governmental intrusion. Nevertheless, the majority, in its desire to reach a result, seeks to redraw that line, giving courts the amorphous authority to grant visitation to a nonparent over objection by a biological parent, under circumstances that the legislature has deemed unnecessary, inappropriate, and unconstitutional.

Third, the majority states that this court recently reaffirmed its equitable power to order visitation. Majority op. at 432 (citing *D.M.M.*, 137 Wis.2d 375, 404 N.W.2d 530, *Z.J.H.*, 162 Wis.2d 1002, 471 N.W.2d 202). The majority correctly notes that in *D.M.M.*, this court stated that certain language in the visitation statute was intended to supplement common law rights of nonparents to petition for visitation. In *D.M.M.*, 137 Wis.2d at 386, 404 N.W.2d 530, the court was grappling

with an ambiguity in the statute. In making the statement quoted by the majority, the *D.M.M.* court sought to ensure that decisions made under common law would continue to serve as a guide in interpreting ambiguities in the statue. See *id.* at 389, 404 N.W.2d 530. The court did not mean to suggest that courts have authority to ignore the constitutionally based standing restrictions of the visitation statute.

Unlike the situation in D.M.M., no one is claiming that the statute as applied to this case is ambiguous. Under the statute, persons who have maintained a relationship similar to a parent-child relationship with the child may seek visitation if they meet the requirements for standing, as originally stated in *Van Cleve* and followed by this court in *Z.J.H.* and in *Cox*. As discussed above, Holtzman lacks standing to seek visitation.

The majority also notes that the *D.M.M.* court stated that the visitation statute seeks to clarify that nonparents "have a right recognized by statute that is not subject to developing and changing common law." *Id.* at 387, 404 N.W.2d 530. The majority apparently quotes this

language for the proposition that although courts may not take away rights guaranteed to nonparents by the statute, courts may give nonparents greater access to visitation than is granted by the statute. However, the visitation statute, through its restrictions on visitation, also seeks to protect the constitutionally guaranteed rights of biological and adoptive parents to raise their children free from unnecessary state intervention. The majority fails to recognize that by granting greater rights of visitation to nonparents, it is necessarily decreasing and impinging upon the constitutionally guaranteed rights of biological and adoptive parents. Cf. Z.J.H., 162 Wis.2d at 1015, 471 N.W.2d 202 (stating that "to the extent that we award custody rights to [a nonparent], we diminish the rights of legal parents"). No court has ever suggested that a nonparent has a constitutionally protected right to visitation of a child when visitation conflicts with the wishes of the biological parent. See id. If one of two competing rights must give way, it should be the one that is not constitutionally protected.

The majority also points to *Z.J.H.* for the proposition that courts in this state have equitable power to order visitation. Majority op. at 432. However, it subsequently contradicts itself, stating that **Z.J.H.** "gives us pause" in concluding that courts maintain equitable power to order visitation under circumstances not specified in the visitation statutes. Majority op. at 433. The majority then purports to overrule Z.J.H., stating that upon further reflection, the reasoning of that case is not persuasive. [FN9]

FN9. The majority purports to overrule any language in Z.J.H. prohibiting courts from granting visitation "on the basis of a co-parenting agreement between a biological parent and another when visitation is in a child's best interest." Majority op. at 434. No co-parenting agreement was alleged to exist in this case. Op. at 437 n. 41. Therefore, whether circuit courts may grant visitation on the basis of a co-parenting agreement is not at issue in this case. The majority's attempt to overrule the *Z.J.H.* language regarding

co-parenting agreements is clearly dicta.

*448 The majority finds the reasoning of *Z.J.H.* unpersuasive because it prevents the majority from reaching its predetermined legal conclusion. The policy and law of this state have not changed within the last four years, but the complexion of the court has and, apparently, the new majority does not place much stock in the doctrine of stare decisis.

Z.J.H. is troubling for the majority because the facts in that case are strikingly similar to the facts in this case. In *Z.J.H.*, two women, Hermes and Sporleder, lived together as companions for approximately eight years. After an unsuccessful attempt at artificial insemination of Sporleder, they decided that Hermes would adopt a child. Z.J.H. was born and shortly thereafter was placed in their home as a pre-adoptive placement. Hermes continued to work outside the home, while Sporleder provided the primary care for Z.J.H. The parties entered into a coparenting agreement, whereby they agreed that if they separated the person without custody would have liberal visitation

rights to Z.J.H. Approximately one year later, the parties separated. Subsequently, Hermes formally adopted Z.J.H. and prohibited Sporleder from seeing Z.J.H.

Although the *Z.J.H.* court discussed its prior decision in *D.M.M.*, the court did not state or imply that courts have equitable power to order visitation under other circumstances not declared by the legislature. In fact, the court stated just the opposite and held that Sporleder, the nonparent, lacked standing to seek visitation. The rationale behind [Van Cleve and *Soergel*] was that the legislature did not intend to override a parent's determination of visitation unless an underlying action affecting the family unit had been filed, because in such an instance, ordering visitation with non-parents may help to mitigate the trauma and impact of a dissolving family relationship. *Soergel*, 154 Wis.2d at 571-72 [453 N.W.2d 624]; *Van Cleve*, 141 Wis.2d at 549 [415 N.W.2d 571]. The presence of an intact family unit merely signals the absence of a dissolving family relationship. In this case, whether the conclusion results from (a) the

characterization of Hermes and Z.J.H. as an 'intact family unit,' or (b) the absence of an underlying action affecting the family unit, the same result occurs: there is no authority for Sporleder to petition for visitation rights. .... [R]ights to custody and visitation are controlled by statutory and case law, and cannot be contracted away. 'When the legislative will is expressed in peremptory terms of a statute it is paramount and absolute and cannot be varied or waived by the private conventions of the parties.' *Grams v. Melrose- Mindoro Jt. School Dist. No. 1*, 78 Wis.2d 569, 578, 254 N.W.2d 730 (1977). Because we conclude that the legislative intent grants custody and visitation rights to non-parents only under the circumstances described above, the contract is void to the extent it purports to award custody or grant visitation rights to Sporleder. *Z.J.H.*, 162 Wis.2d at 1022-24, 471 N.W.2d 202 (emphasis added). The reasoning in *Z.J.H.* is sound. The court appropriately applied and followed the law of visitation in this state.

Not only does the majority opinion ignore legislative intent and precedent

from this court, it also removes the lid from Pandora's infamous box. Indeed, how far does a court's equitable power extend? If courts have equitable power to order visitation under circumstances not specified by statute, then why do they not have equitable power to order custody under circumstances not specified by statute. The majority concludes that "[t]he adoption and custody statutes ... are different from the visitation statutes in regard to preemption" because this court has expressly stated that adoption and custody are governed solely by statutory law. Majority op. at 431. However, I can find no distinguishing language in the visitation, adoption, and custody statutes that even suggests that the legislature did not intend to occupy the field of visitation, but did intend *449 to occupy the fields of adoption and custody. The "it is so because we say it is so" reasoning employed by the majority is another example of the majority writing the law to facilitate its desired result.

After emasculating the statutory law of visitation, the majority invents new requirements for standing that must be satisfied before a circuit court can

exercise its equitable power to hear a petition for visitation. [FN10] Majority op. at 435. First, the petitioner must show that he or she has a parent-like relationship with the child. Majority op. at 435. Under the majority's requirements for establishing such a relationship, live-in boyfriends, live-in girlfriends, long-term house guests, and others who live in the child's household could conceivably and easily qualify. [FN11]

FN10. This court's "equitable power," where it has any such power, is self-regulated and not clearly defined. This is unsettling because if the court has equitable power even after the legislature has spoken, then at any time in the future a majority of this court could again invoke its equitable power and again change the test for standing to seek visitation if, in the court's opinion, doing so would be in the best interests of a child. For instance, suppose that a neighbor who has played a significant role in a child's development brings a petition for visitation rights to the child. Under the majority's current standing test, the neighbor lacks standing because he or she

could not show, among other things, that he or she lived in the same household as the child. See majority op. at 435. However, if the court believes that it is in the child's best interest to grant visitation rights to the neighbor, the court can presumably invoke its equitable power, again rewrite the test for standing, and allow the neighbor to seek visitation.

FN11. I agree with the statement by the concurrence that the issue in this case is not, and should not be, sexual orientation or sexual relationships. The issue is whether this court is legislating from the bench, ignoring past precedent, and giving lip service to the constitutional rights of biological parents. Nonetheless, one must wonder whether the majority would go to such lengths to reach the same conclusion if the person petitioning for visitation in this case were the biological mother's live-in boyfriend.

Second, the petitioner must identify a significant triggering event that justifies state intervention in the

child's relationship with a biological or adoptive parent. Majority op. at 436. According to the majority, the petitioner can identify a significant triggering event by showing that the biological or adoptive parent has substantially interfered with the petitioner's parent-like relationship with the child, and that the petitioner sought court-ordered visitation within a reasonable time after the parent's interference. Majority op. at 436. This is a meaningless requirement. If two parties are disputing over visitation rights, the legal parent nearly always has "interfered" with the petitioner's parent-like relationship with the child. Thus, unless the petitioner has failed to promptly seek court-ordered visitation, he or she will always have standing. If a biological parent decides that he or she does not want a biological stranger to see the child anymore, the biological parent should have the right to make that decision. Under the court's lax requirements for standing, the parent may not have that right. The majority's opinion has left the concept of "parental autonomy" with very little meaning.

I am troubled by the fact that the majority has created a new area of family law that has standards that are lower than the legislatively declared family law of this state. Nearly every person who lives in the child's household could satisfy the majority's standing requirement. Thus, the majority's "triggering event" boils down to little more than a best interests test. As stated above, both this court and the United States Supreme Court have held that a court may not infringe upon a parent's constitutionally protected right to decide who visits the child simply because the court believes that visitation would be in the best interest of the child. Thus, the majority's "triggering event" violates Knott's due process rights as guaranteed by the Fourteenth Amendment to the United States Constitution. [FN12] Parents, not the courts, should determine whether visitation is in their children's best interests.

FN12. The majority states that it is "mindful of preserving a biological or adoptive parent's constitutionally protected interests...." Majority op. at 421, 435. Nonetheless, it gives those

interests, like relevant past precedent, no weight in reaching its all too apparent predetermined legal conclusion. Clearly, this is a case where what the majority says and what it does are two entirely different things.

***450** Wisconsin now has two areas of family law, and persons seeking visitation can apparently choose the area that best suits them. One area of family law is declared by the legislature, representing the will of the people of this state. The other area of family law is declared by four justices of this court, representing only their own wills and moral views. As Justice Geske so recently and so aptly stated: "The legislators, as representatives of the people of this state, have both the right and the responsibility to establish requirements for a legal adoption, for custody, and for visitation. This court cannot play that role. We can only interpret the law, not rewrite it." *Angel Lace M.*, 184 Wis.2d at 520, 516 N.W.2d 678 (Geske, J., concurring). Rewriting the law is precisely what the majority does in this case. This is truly a case of the

judiciary functioning at its lowest ebb of legitimacy.

For these reasons, I concur with that part of the opinion denying custody and dissent from that part of the opinion relating to visitation.

I am authorized to state that Justice ROLAND B. DAY joins this concurring and dissenting opinion.

WILCOX, Justice, concurring in part; dissenting in part.

I agree with the majority in this case that the circuit court properly concluded that Knott was entitled to summary judgment concerning the custody action commenced under sec. 767.24(3), STATS.

I disagree with the majority, however, as to its conclusion that the ch. 767 visitation statute--sec. 767.245, STATS.--does not apply to Holtzman's petition for visitation rights to Knott's biological child. I believe that the legislature intended that circuit courts' powers regarding visitation were to be derived exclusively from sec. 767.245. Further, in reviewing and applying the cases construing sec. 767.245 to the facts

at hand, I can only conclude that the circuit court was correct in determining that Holtzman's petition for visitation rights for H.S. should be dismissed. My conclusion that Holtzman should not have the right to petition for visitation in this case is not reached easily, as this case presents emotionally charged issues. Nonetheless, I believe that by recognizing Holtzman's right to petition in this case, this court is usurping the proper functioning of the legislature.

Section 767.245, STATS., provides: Visitation rights of certain persons. (1) Upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child. (2) Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the child. Under the majority's analysis, the events triggering application of this statute only "relate to the dissolution of a marriage."

Majority op. at 430. Because "[t]he child in this case was not born of a marriage or adopted during a marriage, and his biological mother has not been married during his life," the majority concludes that the legislature did not intend sec. 767.245 to apply under the facts of this case. I believe that the majority's conclusion that the statute does not apply in this case is erroneous.

First and foremost, sec. 767.245, STATS., is titled "Visitation rights of certain persons." A reasonable person would read this to mean that an individual seeking visitation of a child would necessarily proceed thereunder. In fact, Holtzman specifically filed a petition under sec. 767.245. [FN1] Further, there can be no dispute that Holtzman has maintained a ***451** relationship with H.S. "similar to a parent-child relationship." In my mind, sec. 767.245 clearly applies to the facts of this case. [FN2]

FN1. Somewhat troubling on this point is the fact that Holtzman never argued that courts have the equitable power "to grant visitation apart from sec. 767.245, STATS., on the basis of a co-parenting

agreement between a biological parent and another when visitation is in the child's best interest." Majority op. at 434. On the contrary, Holtzman centered her arguments on the fact that although sec. 767.245 controlled, it was broad enough to encompass the facts of this case. Although the majority recognizes that Holtzman's arguments derivative to the statute are erroneous, nonetheless, it proceeds to develop the "equitable powers" argument that the majority believes she should have made.

FN2. In a footnote, the majority asserts that "[c]hapter 767 ordinarily does not apply unless there is a marriage or the dissolution of a marriage." Majority op. at 430 n. 26. I agree that this is often true. However, until today it has not been a bright line rule. Even the case cited by the majority to support this conclusion is equivocal: the Family Code, of which ch. 767, STATS. is an integral part, "applies, for the most part, to those couples who have been joined in marriage according to law." *Watts v. Watts*, 137 Wis.2d 506, 518-19, 405 N.W.2d 303, 309 (1987).

As the majority implicitly recognizes, once it is established that sec. 767.245, STATS., controls, it becomes clear that Holtzman lacks standing to petition for visitation. This is so because our cases interpreting sec. 767.245 have consistently held that a person lacks standing to bring a visitation petition absent an underlying action "affecting the family unit" as well as a dissolving family unit. As we explained in *Cox v. Williams*, 177 Wis.2d 433, 439, 502 N.W.2d 128, 130 (1993): A person has standing to seek nonparent visitation under sec. 767.245(1), STATS., when two circumstances are present: first, an "underlying action affecting the family unit has previously been filed"; and second, the child's family is nonintact, so that it may be in the child's best interests to order visitation "to mitigate the trauma and impact of [the] dissolving family relationship." See also *In re Interest of Z.J.H.*, 162 Wis.2d 1002, 1022, 471 N.W.2d 202, 212 (1991); *Van Cleve v. Hemminger*, 141 Wis.2d 543, 546, 415 N.W.2d 571, 573 (Ct.App.1987).

The question in the present case thus becomes two-pronged: (1) whether an

underlying action affecting the family unit has been filed; and (2) whether the family unit is dissolving. My interpretation of the applicable statutes and case law leads me to conclude that both inquiries must be answered in the negative.

Section 767.02, STATS., sets forth what the legislature considered to be "actions affecting the family." Among those actions listed are divorce, legal separation, and annulment. See Section 767.02(1), STATS. The statute makes no reference to the dissolution of relationships involving bonds between same sexed individuals. Holtzman herself recognizes that her separation from Knott does not fall into any of the listed actions. Petitioner's brief at 18. She asserts, however, that the separation was a de facto divorce and should therefore be recognized as an action affecting the family. This is a question whose resolution is particularly within the province of the legislature. Because I believe Holtzman's petition for custody/visitation is not an action affecting the family, she has failed on the first prong.

As to the second prong, there is no dispute that the unit comprising Holtzman, Knott, and H.S. is dissolving. Considering the time and energy spent on fostering the growth of this unit, its dissolution is no small matter. The question, however, is whether this unit is a "family unit" within the meaning of Wisconsin law. I think not. Holtzman and Knott are not (nor could they ever be under the current state of law) a legally married couple. Further, H.S. is not the biological son of Holtzman. Finally, Holtzman is not an adoptive parent of H.S. See *In Interest of Angel Lace M.*, 184 Wis.2d 492, 516 N.W.2d 678 (1994). These facts indicate that Holtzman, Knott, and H.S. are not a dissolving "family unit" as that term is to be construed for purposes of ch. 767. Further, as this court recognized in Cox, an intact family can consist of a biological mother and her child. *Cox*, 177 Wis.2d at 440, 502 N.W.2d at 130. Here, there is no dispute that Knott is the biological mother of H.S. Thus, Holtzman has also failed under the second prong.

In sum, while I recognize the troubling aspects of this case, I

nonetheless believe that the current state of the law does not allow Holtzman standing to petition for the visitation of H.S. I believe that the majority has entered into the realm of the legislature and that it should defer to that body on this issue. As we previously have noted, "[t]his court does not sit as a superlegislature debating and deciding upon the relative merits of legislation." *Coffee-Rich, Inc. v. Department of Agriculture*, 70 Wis.2d 265, 269, 234 N.W.2d 270, 272 (1975); see also *Laskaris v. ***452** City of Wisconsin Dells, Inc.*, 131 Wis.2d 525, 534, 389 N.W.2d 67, 71 (Ct.App.1986) ("The judiciary is not, however, a superlegislature.")

For the reasons set forth above, I concur in part and dissent in part with the majority opinion.

STATE OF WISCONSIN CIRCUIT COURT DANE CO
BRANCH 14

In Re the Custody of:
H.H.K.
SANDRA LYNN HOLTZMAN,
Petitioner
and CASE NO.: 93 FA 1668
ELSBETH KNOTT,
Respondent.

DECISION AND ORDER

BACKGROUND

This matter comes before the court on respondent's motion for summary judgment. Petitioner, Sandra Lynn Holtzman, asks the court for custody or visitation rights to respondent's son, H.H.K. Respondent, Elsbeth Knott seeks summary judgment, claiming the family court cannot provide the relief requested by petitioner. This matter having been fully briefed before the court, the court renders the following decision and order.

FACTS

Sandra Holtzman (Holtzman) and Elsbeth Knott (Knott) are two women who shared a close, committed relationship for over 10 years. Given the societal and legal standards to which they are subject, the couple did everything they could to create and formalize a normal family relationship.

Holtzman and Knott met in February, 1983 in Boston, Massachusetts. In October, 1983, they began to live together in a home they purchased jointly. On September 15, 1984, Holtzman and Knott solemnized their commitment to each other, exchanging vows and rings in a private ceremony. Knott and Holtzman annually celebrated their anniversary on September 15. From the beginning of their

relationship, Holtzman and Knott discussed their desire to have a child. They investigated their options, both through adoption and procreation, and decided that one of them would become pregnant by artificial insemination. Holtzman and Knott decided to use sperm from a man they did not know personally so that the two of tem would be the child's only known or identifiable parents.

Knott became pregnant in March 1988. Holtzman attended every obstetrical visit and every childbirth class with Knott. Together, they prepared the baby's room and purchased baby furniture, clothes, carriage and supplies. Knott and Holtzman jointly decided on the baby's name. H.H.K. was born on December 15, 1988.

From H.H.K.'s birth until about January 1, 1993, Holtzman, Knott and

H.H.K. led their lives as a normal family. Holtzman and Knott shared parental responsibilities. H.H.K. considers both of them his parents. They attended church, went on family outings, developed family rituals and celebrated holidays together. They talked to H.H.K. about diferent kinds of families and assured him that he had two parents who loved him very much.

Holtzman spent individual time with H.H.K.. They enjoyed reading and playing games indoors. They also played outdoors. Holtzman took H.H.K. for rides in his sled; she taught him how to ice skate, ski, ride a tricycle, catch and throw a ball, shoot baskets and fish. She enrolled him in swimming lessons, and took him regularly to the art museum. She took him to every Children's Day at the zoo.

She took him trick or treating at Halloween, visited his pre-school and chaperoned field trips. She took him to his school carnival, a local college's summer festival, and the Dane County Junior Fair. Holtzman devoted herself to H.H.K..

In June, 1992, Holtzman, Knott and H.H.K. moved to Madison so that Holtzman could attend the University of Wisconsin Law School. They purchased a home together. H.H.K. had an opportunity to develop a closer relationship with Holtzman's family, who lived in the Madison area. H.H.K. has become very close to Holtzman's family; he has spent much time with them and considers them to be his extended family.

During the fall of 1992, Holtzman claims to have noticed a change in Knott's

behavior. Throughout the fall, Knott withdrew emotionally. She suffered from depression, engaged in self-mutilation and was placed on a suicide watch by the Mental Health Center of Dane County. Since November, 1992, Knott has been receiving medical treatment for depression and anxiety. Holtzman also noticed Knott's ability to care for her child began to deteriorate. Holtzman claims Knott regularly forgot to feed H.H.K. Holtzman would then step in and feed H.H.K. if he had not been fed by 7:30 p.m. Knott dressed H.H.K. inappropriately for the weather, dressing him too warmly on occasion. Knott stopped providing intellectual stimulation for H.H.K. Finally, Knott was constantly critical and condescending to H.H.K., and unable to put his needs before her own.

On January 1, 1993, Knott told Holtzman she was ending their relationship. Although estranged, the couple continued to live in the same household, sharing parenting duties. Holtzman wanted, for H.H.K.'s sake, to keep the family intact.

On May 26, 1993, Knott and H.H.K. moved out of Holtzman's household. Holtzman continues to make every effort to maintain family contacts with H.H.K. During June and July, 1993, Holtzman picked up H.H.K. on Friday afternoons and returned him to Knott, at Knott's direction, on Saturday afternoons. Holtzman and H.H.K.also saw each other during the week. Because Knott refused to set a schedule for visitation, Holtzman had to call Knott for permission to see H.H.K. every week.

Holtzman continued her visits with H.H.K. until late August, 1993. Holtzman called Knott on August 24 to set up a visit with H.H.K. Knott then informed Holtzman that she was terminating Holtzman's relationship with H.H.K.

Two days later, on August 26, Knott asked for an injunction in Dane County Circuit Court, claiming that Holtzman had threatened and intimidated her. She asked the court to restrain Holtzman from having any contact with her or H.H.K. At the hearing on the petition, On September 1, 1993, before Judge Callaway, Holtzman and Knott entered into a stipulation on the record. Knott agreed to dismiss the petition; Holtzman agreed that she would not contact Knott. Knott and Holtzman agreed to refer the visitation issue jointly to family court, to participate in

a study to be conducted by the Dane County Family Court Counseling Service and to have a guardian ad litem appointed.

Holtzman filed a petition for custody with the family court on September 16, 1993. On September 21, 1993, Knott filed this motion for summary judgment.

STANDARD OF REVIEW

Summary judgment is a means by which to determine whether a legal dispute must be resolved prior to trial. U.S. Oil v. Midwest Auto Care Services, 150 Wis. 2d 80, 86, 440 N.W. 2d 825 (Ct. App. 1989). When evaluating the propriety of a motion for summary judgment, the court employs a standard two-step procedure. The first step requires the court to examine the pleadings to determine whether a claim for relief has been stated. Voss v. City of

Middleton, 162 Wis. 2d 737, 747, 470 N.W. 2d 625 (1991). If a claim for relief has been stated, the court must then determine if there are any triable issues of material fact which preclude summary judgment. Id. at 747-48; see also, State v. Rollfink, 162 Wis. 2d 121, 133-34, 469 N.W. 2d 398 (1991).

Under sec. 802.08(2), Wis. Stats., summary judgment must be granted if the pleadings, depositions, depositions, answers to interrogatories, and admissions on file, together with the afffidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Voss, 162 Wis. 2d at 748. To make a prima facie case for summary judgment, a moving defendent must show a defense which would defeat the claim. Grams v. Boss, 97 Wis. 2d 332, 338, 294 N.W. 2d 473 (1980). If the moving party has made a prima facie case for summary

judgment, the court examines the opposing party's affidavits to determine whether a genuine issue exists as to any material fact, or reasonable conflicting inferences may be drawn from the undisputed facts. Id.

When the material presented on the motion is subject to conflicting interpretations or reasonable persons may differ as to its significance, it is improper to grant summary judgment. Schlumpf v. Yellick, 94 Wis. 2d 504, 512, 288 N.W. 2d 834 (1980). Summary judgment is appropriate only when material facts are not in dispute and only when inferences that may reasonably be drawn from those facts are not doubtful and lead to but one conclusion. Fuller v. Riedel, 159 Wis. 2d 323, 464 N.W. 2d 97 (Ct. App. 1990). See also, Continental Casualty Co.

v. Wisconsin Patients' Compensation Fund, 164 Wis. 2d 110, 473 N.W. 2d 584 (Ct. App.) 1991). Summary judgment should not be granted if reasonable persons could reach reasonable but differing inferences and results from the undisputed facts. Maynard v. Port Publications, Inc., 98 Wis. 2d 555, 297 N.W. 2d 500 (1980).

Because summary judgment is a drastic remedy, any reasonable doubt as to the existence of a genuine issue of material fact must be resolved against the granting of the motion. Heck & Paetow Claim Service, Inc. v. Heck, 93 Wis. 2d 349, 356, 286 N.W. 2d 831 (1980). But the mere existence of some alleged factual dispute does not defeat a summary judgment motion: "the requirement is that ther be no genuine dispute of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 248 (1986) (emphasis in original). A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id.

As to the materiality requirement, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. Id.; Hilkert v. Zimmer, 90 Wis. 2d 340, 342, 280 N.W. 2d 116 (1979); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 106, 100 N.W. 2d 359 (1960). "A summary judgment should be granted when it is clear that a formal trial could serve no useful purpose and could only result in a judgment as a matter of law." Id. On summary judgment,

the moving party has the budren of establishing the absence of a genuine issue as to any material fact. Kremers-Urban Co. v. American Employers Insurance Co., 119 Wis. 2d 722, 734, 351 N.W. 2d 156 (1984).

It is against these standards that the court asesses the motion.

DISCUSSION

As Justice Bablitch put it in In re Interest of Z.J.H., 162 Wis. 2d 1002, 471 N.W. 2d 202 (1991), "[i]t is a legal truism that hard cases make bad law." Id. at 1033 (Bablitch, J., dissenting). The converse is also true. Bad law makes hard cases. The court sees this as a case where a family member ought to have the right to visit and keep an eye on the welfare of a minor child with whom she has

developed a parent-like relationship. Unfortunately because the law does not recognize the alternative type of relationship which existed in this case, this court cannot offer the relief Holtzman seeks.

The question for this court is whether a person, not biologically related to a minor child, can bring an action for visitation or custody of that child, where that person lived as a partner with the biological mother and child, developed a parent like relationship with the child, and shared in all parenting duties with the child's biological mother. Unfortunately, the court determines a non-related "second parent" is an unrelated third person as between the biological mother and child, and may not bring a family action for either custody or

visitation. For this reason, the court must grant Knott's motion for summary judgment.

THE CUSTODY ACTION

Holtzman, who is not H.H.K.'s biological mother, seeks custody of Knott's minor child under ch. 767, Stats. Custody actions are governed by sec. 767.24, Stats. Generally, only a parent has status to seek custody of a minor child. Sec. 767.24 (1), Stats. "[A] non-parent may not bring an action to obtain custody of a minor child unless the natural or adoptive parent is unfit or unable to care for the child, or there are compelling reasons for awarding custody to a third party." In re Interest of Z.J.H., 162 Wis. 2d at 1009 (citing Barstad v. Frazier, 118 Wis. 2d at 568).

Initially, the parties disagree over the extent of the family court's jurisdiction. In Z.J.H., the supreme court held that an unrelated third person did not have "standing" to sustain an action to obtain custody of a minor child. In re Interest of Z.J.H., 162 Wis. 2d at 1008-09. Z.J.H. involved a custody fight over a recently adopted child, ensuing after the non-marital companions' eight year relationship dissolved.[1]

Knott, relying on Z.J.H., argues Holtzman does not have standing to sustain an action to obtain custody of H.H.K. Holtzman argues that the parties

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[1]The litigants in Z.J.H. were two women. Under Wisconsin law, only married couples may jointly adopt a child. Sec. 48.82 (1), Stats. State law does not recognize homosexual marriag See, Sec. 765.001, Stats. Since the couple was not married, the couple had to decide between themselves as to which of them would be the adoptive parent.

stipulated to the family court's jurisdictionin a prior civil proceeding; since they have stipulated to this court's jurisdiction, Knott should be estopped from raising the "standing" issue litigated in Z.J.H.

Standing generally involves a question as to what person may properly challenge a certain government action or administrative ruling. See, Moedern v. McGinnis, 70 Wis. 2d 1056, 236 N.W. 2d 240 (1975). The question is not oneof the merits of the claim, but whether that claim is being brought by an appropriate party. The Z.J.H. standing concept is subtly different: "Standing in custody cases had generally referred to whether an individual has status to bring an action for custody under the applicable statute." In re Interest of Z.J.H., 162 Wis. 2d at

1008 n.3. Standing in family law thus looks at whether someone has a claim on the merits.

Knott has properly submitted to the jurisdiction of this court. Knott now asks this ccurt to grant summary judgment on the merits. Knott is not now estopped, because of her stipulation to bring the custody action before the family court, from asking this court to conclude Holtzman is without rights as a matter of law.

II.

Holtzman argues she has a constitutionally protected relationship with H.H.K. which entitles her to treatment as a parent under ch. 767. In support of her position that she should be recognized as a parent, Holtzman cites two

Supreme Court cases which involved custody disputes. Michael H. v. Gerald D., 491 U.S. 110 (1989); Lehr v. Robertson, 463 U.S. 248 (1983). Both cases support her position that a person's constitutional rights as a parent do not promarily arise from a biological source. In both cases, the court favored an established family-type relationship over a biological bond. In Lehr, a biological father who had not had any contact with his child asked the Court to invalidate New York's statutory adoption scheme. He argued that as a biological father, he was entitled to notice and hearing before someone else could adopt the child. The court rejected the father's argument. "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more

enduring." Lehr v. Robertson, 463 U.S. at 260 (citing Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., concurring).

> The mere existence of a biological link does not merit equivalent constitutional protection . . .
>
> [T]he importance of the familial relationship, to the individuals involved and to the society,
>
> stems from the emotional attachments that derive from the intimacy of daily association.

Id.; accord, Michael H. v. Gerald D., 491 U.S. at 123 (Scalia, J., separate opinion) ("Michael reads [our prior cases] . . . as establishing that a liberty interest is created by biological fatherhood plus an established parental relationship . . . We think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon historic respect . . . traditionally accorded to the relationships that develop within the unitary family"). Her parent-

like bond with H.H.K., Holtzman argues, is strong enough to merit similar constitutional protection, including the right to seek custody or visitation rights. She has been in a close parent-like relationship with H.H.K. for five years. H.H.K. believed Holtzman was one of his parents. She has shared substantially in child-raising duties with Knott, and she has been the family's major financial provider.

There is some force to petitioner's argument that she should be recognized as a parent. The Wisconsin Supreme Court, however, has on several occasions been invited to recognize a protected status in one who stands in place of a parent, as against a biological or adoptive parent. See, Ponsford v. Crute, 56 Wis. 2d 407, 202 N.W. 2d 5 (1972); Barstad v. Frazier,

118 Wis. 2d 549, 348 N.W. 2d 479 (1984). In Barstad, the court awarded custody to the biological mother even though the child had been raised by his grandmother and, by all accounts, was happy where he was. Barstad v. Frazier, 118 Wis 2d at 551, 553. In Ponsford v. Crute, the court upheld an order directing a minor child be taken from its maternal grandparents and placed in the custody of the child's father. Ponsford v. Crute, 56 Wis. 2d at 413. The 4 year old child had lived in the grandparent's household for three and one-half years. Id. at 409-11. The child had been raised solely by its mother until it was six months old. Id. at 409. The mother died when the child was one and one-half years old. Id.

In each of those cases, the supreme court could have recognized a

constitutional right inherent in the parent-like relationship then existing. It refused to recognize any such right. By contrast, the court has recognized a constitutionally protected family relationship in the biological parent. See, In re Interest J.L.W., 102 Wis. 2d 118, 136, 306 N.W. 2d 46 (1981). This court is bound by the decisions of the Wisconsin Supreme Court. If Holtzman seeks recognition of a constitutionally protected right to proceed to seek custody or visitation, she must look to the supreme court to reconsider its prior rulings and recognize that right.

III.

Since Holtzman cannot be recognized as a parent under Wisconsin law, she may not bring an action unless, "the natural

or adoptive parent is unfit or unable to care for the child, or there are compelling reasons for awarding custody to a third party." In re Interest of Z.J.H., 162 Wis. 2d at 1009. Holtzman makes allegations that both compelling circumstances do exist, and that Knott is not a fit parent. Normally, such allegations would be sufficient to warrant a hearing. But the supreme court has ruled that only a limited set of non-parents may make allegations of parental fitness. The court has also ruled that compelling circumstances are to be narrowly defined.

a. Parental Fitness

Where the fitness of a parent is in dispute, a non-parent can get jurisdiction in a custody action by way sec. 767.24

(3), Stats. That section provides:

> a relative can acquire custody, "[i]f the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child," under a child in need of protection or services (CHIPS) proceeding." (emphasis aded).

Holtzman is not a relative, nor is she asking the court to award custody of H.H.K. to one of Knott's relatives.[2] Moreover, as discussed below, Holtzman's allegations do not raise any contestable inference that Knott is an unfit parent, she cannot be bringing an action under sec. 767.24 (3), Stats.

b. Compelling Circumstances

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[2]The vehicle for pursuing custody under sec. 767.24 (3) is apparently a "child in need of protective services" (CHIPS) proceeding under ch. 48, Stats. Petitioner has not asked this court or the juvenile court to conduct a CHIPS proceeding.

Unrelated third persons may acquire custody of a minor child if "compelling circumstances" exist, which necessitate awarding custody to one other than the child's parent. In re Interest of Z.J.H., 162 Wis. 2d at 1010. "Compelling circumstances include abandonment, persistent neglect of parental responsibilities, extended disruption of parental custody, or other similar extraordinary circumstances that would drastically affect the welfare of H.H.K. Accepting all of Holtzman's allegations as true, as this court must, the record shows no compelling circumstances, of neglect or otherwise, which would warrant taking custody from Knott. Mental illness is a serious problem, but standing alone, it is not a ground for removing H.H.K. form Knott's care. The question is still

whether the parent's alleged mental illness drastically affects H.H.K.'s welfare. Although Holtzman alleges Knott frequently did not feed H.H.K., she does not allege H.H.K. is an underfed or malnourished child. She merely states that she fed H.H.K. on those occasions when Knott had forgotten. Such behavior is not unusual in a household which shared parenting duties. As to the child being inappropriately dressed; dressing a child in a sweatshirt on a hot day may reflect on overzealous parent, it may also reflect poor judgment. It does not reflect persistent neglect warranting interference by this court.

Nor do Holtzman's remaining allegations represent compelling circumstances similar to abandonment, persistent neglect of parental

responsibilities, or extended disruption of parental custody. Holtzman may properly disapprove of Knott's critical and condescending treatment of H.H.K. Holtzman may provide an intellectually more stimulating environment as the custody parent of H.H.K. than does Knott. Holtzman may be more sensitive to H.H.K.'s feelings, and better respect his individuality. But a mother's criticism and a lack of intellectual stimulation are not "compelling circumstances" which necessitate awarding custody to one other than the child's parent, nor are they evidence of persistent neglect sufficient to take custody from the biological parent. Since none of Holtzman's allegations show the existence of any compelling circumstances as defined by the law, she may not, as an unrelated third

person, challenge Knott's continued custody of H.H.K.

THE VISITATION ACTION

Finally, Holtzman seeks visitation rights with H.H.K. Under state law, this court can grant a person "who has maintained a relationship similar to a parent-child relationship with the child" visitation rights, if the court determines that to do so is in the best interests of the child. Sec. 767.245 (1) are implicated." In re Interest of Z.J.H., 162 Wis. 2d at 1020. Holtzman relies on the custody action as her underlying action. Since this court has concluded that Holtzman may not bring a custody action, her request for visitation must also be denied.

COMMENT

This court essentially agrees with the views expressed by Justice Bablitch in Z.J.H. Under current Wisconsin law the best interests and general welfare of children of a dissolving nontraditional relationship are ignored. Justice Bablitch expressed the view that the majority's result in Z.J.H. was greatly influenced by the facts and he therefore could not accept the majority's opinion as a prediction of what the Supreme Court's holding would be in future cases involving children of nontraditional relationships. Perhaps this case is one to form the basis for reconsideration, perhaps not, One cannot but wonder if the result in prior cases on appeal was influenced by the nontraditional relationship of the parties. If a widow with a young child were to live with a man for a lengthly

period of years; if aclose parent-child relationship were to form between the child and the man he or she came to accept and view as their parent; and if the adults were to then separate; what visitation rights would the man have? Under the currentlaw, there would be none. Would these facts have lead to the same results as that in Z.J.H.?

There are an increasing number of children in this society for whom the mother is the only known biological parent. Frequently that mother forms a lengthly relationship living with another person, be they man or woman, who assumes a parental role in the child's life for many years. Why should such children be denied the love, guidance and nurturing of the parental bond which developed simply because the adults cannot maintain their

relationship? Lack of love and guidance in the lives of children is a major problem in our society. Does it make sense for the law to worsen this said fact by denying a child contact with one they have come to accept as their parent, especially when it clearly appears to be in the best interests of the child? This court urges the appellate courts and the legislature to reexamine the law in light of the realities of mmodern society and the interests of its children.

ORDER

Petitioner Sandra Lynn Holtzman does not have status to bring a custody suit under ch. 767, Stats. Without status to bring a custody suit, Holtzman is not entitled to visitation rights under sec. 767.245 (1), Stats. Summary judgment is

GRANTED in favor of respondent, Elsbeth Knott. Sandra Lynn Holtzman's petitions for custody and visitation are DISMISSED.

IT IS SO ORDERED.

Dated this __ day of _____, 1995.

BY THE COURT

_____
George A.W. Northrup
Circuit Court Judge
Branch 14

Ammendment IX [1791]

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Ammendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilages or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.